UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION
This Document Relates to:
MARK NEWBY, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. ENRON CORP., et al., Defendants.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. KENNETH L. LAY, et al., Defendants.

H01-3624

Civil Action No. H01-3624
(Consolidated)

CLASS ACTION

DEFENDANT JEFFERY K. SKILLING'S MOTION TO DISMISS CONSOLIDATED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) FOR FAILURE TO STATE A CAUSE OF ACTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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RULES

PRELIMINARY STATEMENT

Stripped of its rhetoric and ignoring its self-serving, yet legally insufficient conclusory allegations, the Newby Consolidated Complaint ("NCC" or "Complaint") fails as a matter of law to plead any actionable securities violation by Defendant Jeffrey K. Skilling. Adopting an impermissible "puzzle pleading" style often thrown out by courts for failure to contain a "short and plain statement of the claim" as required under Federal Rule of Civil Procedure 8(a), plaintiffs have simply dumped volumes of excerpts from press clippings, analyst reports and Enron public filings, characterized them as evidence of phony, fraudulent, or manipulative conduct at Enron, and concluded that such allegations demonstrate fraud. But sheer volume (500 pages) cannot substitute for substance. The Complaint fails to identify with particularity as required under the Private Securities Litigation Reform Act ("PSLRA") and Federal Rule of Civil Procedure 9(b) facts supporting the purported claims; rather, plaintiffs have posited a theory stacking impermissible inference on top of rank speculation to conclude that defendants must have committed fraud and are to blame for Enron's unfortunate collapse.

Seizing upon Enron's restatement, plaintiffs attempt to equate the correction of innocent accounting mistakes with securities fraud. But, at base, even the key allegations on which they rely—a restatement of earnings triggered by admitted mistakes, including one by Enron's long-time auditors, Arthur Andersen, and the technical failure to comply with accounting rules—fail to implicate Mr. Skilling. Plaintiffs do not allege that Mr. Skilling had any role in the accounting decisions that gave rise to the restatement. In any event, the restatement involved a limited number of items, none of which affected cash flow or future period earnings, much less Enron's ability to continue as a going concern. (*See* SEC Joint Appendix ("SEC J.A.") Tab 76 (discussed *infra* at Section II.A).)

The vast majority of the restated amounts were the result of Enron's determining

to consolidate the financial statements of JEDI,[1] and a subsidiary of LJM 1,[2] with Enron's own financial statements. This "consolidation restatement," does nothing more than show Enron's financial statements as though JEDI and the LJM 1 subsidiary were subsidiaries of Enron. This of course is a fiction—they were not subsidiaries of Enron. However, the application of technical accounting rules was deemed to require this presentation long after the fact based on a review of the transactions. This is not the usual restatement found in securities cases alleging fraud, where it is discovered that transactions once recorded actually did not occur or that monies recorded as revenue or earnings were either not received at all or were not received in a particular period. These consolidations did not involve reversing any transactions or involve the discovery of anything phony about any transactions. The earnings which were restated actually existed. Enron had either collected them or was due them from JEDI and the LJM 1 subsidiary. This restatement as explained later below, is simply not the stuff of fraud. It is precisely why courts and the Securities and Exchange Commission ("SEC") have repeatedly stated that a restatement is not necessarily indicative of fraud.

With respect to related party transactions, Mr. Skilling was not involved, nor has he been alleged to have been involved, in any impermissible self-dealing or undisclosed transactions. Plaintiffs have not pleaded any facts demonstrating that Mr. Skilling had knowledge of or otherwise participated in any of the alleged improper related party transactions by other defendants. What is left with respect to Mr. Skilling once the complaint is examined with an eye toward specific, well-pleaded allegations, is nothing more than an inadequate attempt to unfairly saddle Mr. Skilling with Enron's failure by labeling his conduct fraudulent.

Plaintiffs also attempt, again without necessary particularity, and often resorting

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[1] An entity in which Enron had invested.

[2] A third-party investment vehicle.

to legally impermissible "group pleading," to allege an even broader fraud across various Enron business lines over a period of many years. According to the Complaint, plaintiffs suspect fraud pervasively throughout nearly every aspect of Enron's business, including its retail energy services, its wholesale trading, international operations and its broadband business. Plaintiffs' hunch however is not a substitute for well-pleaded facts. And, while plaintiffs may view fraud like pornography, thinking that they know it when they see it, this Court should not permit their opinion and conjecture as to Mr. Skilling to alleviate their burden of satisfying the legal pleading standards—the highly publicized nature of this case notwithstanding.

In those limited instances when plaintiffs have attempted to cite particular statements by Mr. Skilling as evidence of fraud, even a cursory review demonstrates that they cannot give rise to liability, and are protected by one or more established legal principles. As explained more fully below and as set forth in attached exhibits, every statement allegedly made by Mr. Skilling and claimed by plaintiffs to be false or misleading, is protected under the PSLRA's safe harbor for forward looking statements, under the "bespeaks caution" doctrine, and/or under the protections afforded positive statements about business outlook (*i.e.*, mere "puffing").

Plaintiffs must also plead scienter as to Mr. Skilling, but fail on this front as well. In the absence of any specific facts demonstrating Mr. Skilling's scienter with respect to plaintiffs' theory of fraud, plaintiffs resort to trying to prove their fraud case, as well as their insider trading claim, through the opinion of a hired expert witness, Scott Hakala. Apart from the insufficiency for pleading purposes of opinion testimony, Hakala fails to raise a strong inference of scienter. His opinion ignores rational and equally plausible reasons for Mr. Skilling's trading over the lengthy three year class period, neglects to account for much of Mr.

Skilling's holdings (including vested but unexercised options) which were not sold, and fails to even mention that much of Mr. Skilling's trading was conducted under a Rule 10b5-1 protected trading program. Moreover, Hakala does not even attempt to account for the fact that Mr. Skilling terminated that program in June, 2001—conduct wholly inconsistent with an inference of scienter.

This case has been the subject of unprecedented publicity and speculation. The media, Congress and others have created a tone of hysteria, no doubt partly generated by the swift collapse of Enron, but equally attributed to the total lack of understanding of how such a thing easily could occur, and has occurred in the past, when credit and capital is denied businesses conducting trading operations. As a result, committees were formed, inquiries undertaken, and a search for the "culprits" was begun and was swiftly concluded in an irrational atmosphere of anger, blame, and self-interest. The Court is called upon to review plaintiffs' creation outside of the carnival-like atmosphere which so many have done so much to create and sustain, and to apply objective principles of law to a complaint utterly devoid of any facts, save that there has been a restatement and a tragic collapse of a major U.S. corporation. Applicable pleading requirements and legal principles are blind to hysteria and should be applied in this case to dismiss the plaintiffs' amalgam of newspaper stories, rumor, personal beliefs and unsupported conclusions.

ARGUMENT

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO PROVIDE A CONCISE AND DIRECT STATEMENT OF THE CLAIMS AGAINST MR. SKILLING IN VIOLATION OF FED. R. CIV. P. 8(a)

The Complaint should be dismissed as to Mr. Skilling because it fails to provide "a short and plain statement of the claim" against him as required under Fed. R. Civ. P. 8(a). Instead, the complaint contains dozens of scattered allegations mentioning Mr. Skilling—such as

quotations and paraphrases taken from a wide range of inherently unreliable sources—but does not disclose the precise nature of the fraudulent conduct Mr. Skilling is alleged to have committed. Instead, we are challenged to decipher this enormous, confusing compilation of almost everything ever said or done by Enron in the last four years to find the specific fraud claims—if any—on our own. Neither Rule 9(b) nor Rule 8 permits this approach.

Many courts have condemned plaintiffs' disjointed, shotgun-style approach to pleading securities fraud, dismissing complaints because such pleading fails to provide the required specificity, rather than "short and plain statement[s]" of the claim under Rule 8, and because it employs a garrulous style to "mask [ ] an absence of detail." *See Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997); *see also Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1239 (N.D. Cal. 1998) (holding that dismissed Milberg Weiss complaint failed to make allegations simple, concise, or direct, or allow reader to divine why each alleged statement was false or misleading in violation of Rule 8):

> The heightened pleading standard of Rule 9(b) is not an invitation to disregard the requirement of simplicity, directness, and clarity of Fed. R. Civ. P. 8. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). Every plaintiff filing a complaint in a federal district court must prepare his complaint in conformity with Rule 8, which requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a), and that '[e]ach averment of a pleading shall be simple, concise, and direct,' Fed. R. Civ. P. 8(e).

See also Ravens v. Iftikar, 174 F.R.D. 651, 659 (N.D. Cal. 1997) (quoting *WMX*, and noting that Milberg Weiss filings "feature bulk and prolixity"); *Ronconi v. Larkin*, 253 F.3d 423, 437 (9th Cir. 2001) (dismissing Milberg Weiss complaint, noting that "[t]he various requirements are not satisfied merely by making a complaint long.").

The *Wenger* decision has been cited with approval by this Court. *See e.g. In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 893, 902, 914 (S.D. Tex. 2001). As the

Court in *Wenger* explained, such "puzzle-like" complaints should be dismissed because their disconnected structure makes it virtually impossible to sort out plaintiffs' explanations of alleged fraud as to specific individuals, and requires the reader to try to "sort out the statements and match them with the corresponding adverse facts to solve the 'puzzle' of interpreting Plaintiffs' claims.'" 2 F. Supp. 2d at 1244. The Court should dismiss the present Complaint due to its identical failure to comply with the requirements of Rule 8.

Nevertheless, we have tried our best to solve the "puzzle" of plaintiffs' creation. For the reasons set forth below, despite the plaintiffs' five hundred plus pages, the allegations in the Complaint are insufficient to state a claim of securities fraud against Mr. Skilling.

II. PLAINTIFFS HAVE FAILED TO ADEQUATELY ALLEGE FACTS SUFFICIENT TO SUPPORT A 10B-5 CLAIM AGAINST MR. SKILLING

To establish a claim for securities fraud under Securities Exchange Act of 1934 ("Exchange Act") 10(b)[3] and SEC Rule 10b-5,[4] a plaintiff must prove (1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiff relied; (5) that proximately caused the plaintiff's injury. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067-68 (5th Cir. 1994); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520-21 (5th Cir. 1993).

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[3] Section 10(b) of the Exchange Act makes it unlawful for any person:

> To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of public investors.

15 U.S.C. § 78j(b) (2000).

[4] Rule 10b-5, in relevant part, makes it unlawful for any person:

> To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2002).

As disclosed herein, plaintiffs' Consolidated Complaint fails to state a cause of action against Mr. Skilling under Section 10(b) and Rule 10b-5 for several reasons. First, plaintiffs' claim rests almost exclusively on Enron's restatement of its earnings. As a matter of law, a restatement of earnings without more is insufficient to state a claim for securities fraud. Moreover, plaintiffs fail to allege any specific facts that tie Mr. Skilling to the purported cause of Enron's restatement of earnings or that demonstrate his knowledge of the purported "error" which led to the restatement or of any accounting irregularities. Consequently, Enron's restatement simply cannot support a fraud claim against Mr. Skilling.

Second, plaintiffs also attempt to support their claim by use of allegations that Enron generally engaged in certain fraudulent business practices. However, these allegations similarly are devoid of any merit. With respect to Enron as a whole, plaintiffs have failed to provide any specific facts to support their contention that any of the company's business practices were fraudulent. Rather, the allegations are merely unsupported conclusions and beliefs. More specifically, plaintiffs have failed to plead any facts that connect Mr. Skilling to the allegedly fraudulent business practices, even if they occurred.

Third, plaintiffs have failed to plead any actionable misstatements or omissions made by Mr. Skilling. All of the statements that plaintiffs attribute to Mr. Skilling are either: protected forward-looking statements, statements of fact that plaintiffs have failed to allege as fraudulent, or mere optimistic views of a type not actionable as a matter of law. Certainly, under Rule 10b-5, plaintiffs cannot state and claim without alleging an actionable false or misleading statement made by Mr. Skilling.

Finally, plaintiffs have failed to allege any specific facts sufficient to support a strong inference of scienter.

A. PLAINTIFFS ALLEGATIONS CONCERNING ENRON'S RESTATEMENT OF EARNINGS ARE INSUFFICIENT TO SUPPORT A CLAIM AGAINST MR. SKILLING

1. REFERENCE TO THE NOVEMBER 2001 RESTATEMENT DOES NOT ADEQUATELY PLEAD FRAUD AS TO MR. SKILLING

Enron, like many other companies, used a variety of financings and investment structures in its ordinary course of business. Some of these involved the use of "special purpose entities" or "SPEs." Among the SPEs used by Enron was "Joint Energy Development Investments" or "JEDI." Generally Accepted Accounting Principles ("GAAP") provide guidance on the non-consolidation treatment of SPEs from a company's financial statements. On November 8, 2001, Enron filed a "required restatement"[5] of prior period financial statements reflecting consolidation of the financial statements of: (1) JEDI; (2) a JEDI investor named "Chewco," and (3) another entity, a subsidiary of third-party entity LJM1,[6] with Enron's financial statements for the reporting periods 1997-2001. Plaintiffs allege[7] that Enron and its accountants committed an error by failing to report these three entities on a consolidated basis. In addition, the restatement included a reclassification of incorrectly recorded notes receivable[8] and various prior-year proposed audit adjustments which were originally determined to be immaterial. *Id.*

In addition, although plaintiffs contend that the mere fact of the restatement is evidence of fraud, it is well-settled that a restatement, in and of itself, does not indicate or imply fraud. *Lovelace v. Spectrum Software, Inc.*, 78 F.3d 1015, 1020 (5th Cir. 1996) (amended filing does not admit that prior filings were misleading); *Fine v. Am. Solar King Corp.*, 919 F.2d 290,

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[5] (SEC J.A. Tab 76.) Solely for purposes of this Motion, we accept the restatement as necessary and accurate.

[6] LJM1 and LJM2 were not Enron SPEs. Rather, these two entities were formed by the then CFO of Enron as private investment vehicles, with which Enron's business units could deal, if they so chose. (SEC J.A. Tab 76, at page 9.)

[7] (NCC ¶¶ 947, 949.)

297 (5th Cir. 1990); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 315 (5th Cir. 1988); *In re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d 630, 648-49 (S.D. Tex. 2001) (allegations of accounting improprieties and restated financial figures insufficient to establish scienter); *In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401 (S.D. Tex. 2000); *Mortensen v. AmeriCredit Corp.*, 123 F. Supp. 2d 1018, 1025-27 (N.D. Tex. 2000) (correction of prior GAAP violations does not create a strong inference of fraud); *In re SCB Computer Tech., Inc. Sec. Litig.*, 149 F. Supp. 2d 334, 346 (W.D. Tenn. 2001) (magnitude of restatement alone does not establish scienter).

Although plaintiffs allege that Enron and the named Defendants committed fraud in connection with the creation of the financial statements subject to the restatement, they fail to plead any facts which, if true, would show that the accounting adjustments contained in the restatement amount to fraud.[9] On the contrary, the analysis and application of GAAP to the complex company transactions at issue here is a challenging endeavor in which the judgment of reasonable professionals may differ and in which honest mistakes are sometimes made, neither of which suggests fraud. *Lovelace*, 78 F.3d 1020-21 ("A difference in judgment about accepted accounting principles does not establish conscious behavior on the part of Defendants."). More importantly, plaintiffs offer no facts that suggest that Mr. Skilling was involved in the application

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[8] (SEC J.A. Tab 76, at 5.)

[9] *See* Joint Brief at Section IV. In a typical securities case, the defendant company would submit a brief in defense of its disclosures and accounting practices. Here, due to Enron's bankruptcy and its absence from this case, the burden of defending the company's conduct has fallen on the individual former and current officers and directors. Accordingly, certain individual defendants have jointly filed in conjunction with their motions to dismiss a comprehensive brief addressing common issues raised by plaintiffs in the Complaint (the "Joint Brief"). The sheer volume of plaintiffs' allegations and the time constraints imposed in responding to the Complaint render reference to the Joint Brief the most efficient and practical way to respond to certain aspects of the Complaint. For these reasons and in the interest of avoiding repetition, Mr. Skilling adopts and incorporates by reference as set forth below various arguments supporting dismissal of plaintiffs' claims as they apply to Mr. Skilling. Adoption of arguments set forth in the Joint Brief should not be deemed an admission by Mr. Skillling of knowledge of the underlying facts cited in the Joint Brief, and Mr. Skilling specifically reserves his right to take positions in the future contrary to those contained therein.

of GAAP accounting principles to Enron's original, now restated financials, had any reason to believe that they might be incorrectly applied, or that the corrections in question were indicative of fraud. This absence of any facts to suggest involvement in even innocent errors—let alone fraudulent ones—is extremely important where the financial statements were audited and, indeed, the very transactions at issue, were reviewed by Enron's auditors and clean audit opinions were given for the years in question.[10] Accordingly, plaintiffs' allegations of fraud against Mr. Skilling, based on Enron's restatement and accounting, should be dismissed.

a. A Restatement Of Financials Is Not *Per Se* Fraud

Mere publication of inaccurate accounting figures or failure to follow GAAP, without more, does not demonstrate or establish scienter or fraud; a party must know that it is publishing materially false information, or must be severely reckless in publishing such information. *Fine*, 919 F.2d at 297 ("Mere publication of inaccurate accounting figures, or failure to follow GAAP, does not establish scienter.");[11] *Coates v. Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 636 (N.D. Tex. 1999) ("Even had plaintiffs asserted that the [accounting] policy violated industry standards, such violations would alone be insufficient without corresponding fraudulent intent.") Indeed, courts have recognized that there are many events that can cause a restatement. *See, e.g., Mortensen*, 123 F. Supp. 2d at 1021-22.

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[10] By its own admission, the only one of the Restatement items that Arthur Andersen had not previously examined was the reclassification of the notes receivable. *See* Remarks of Joseph F. Berardino, Managing Partner, CEO, Arthur Andersen, U.S. House of Representatives, Committee on Financial Services, Dec. 12, 2001 (explaining that it is not practicable for auditors to test every transaction of a corporation and that the notes receivable were not part of the sample of transactions it had audited). However, this issue seems to have arisen simply as a result of a misapplication of GAAP which resulted in a balance sheet reclassification.

[11] Even the staff of the U.S. Securities and Exchange Commission has recognized that accounting errors resulting in restatements are not *per se* fraudulent. APB Opinion No. 20 describes and provides the accounting and disclosure requirements applicable to the correction of an error in previously issued financial statements, and does not assume errors involve fraud. As the SEC has stated: "Because the term 'error' as used in APB Opinion No. 20 includes '*oversight or misuse of facts that existed at the time that the financial statements were prepared,*' that term includes both unintentional errors as well as intentional fraudulent financial reporting and misappropriation of assets as described in Statement on Auditing Standards No. 82, *Consideration of Fraud in a Financial Statement Audit.*" SAB 101B (note 1), 65 Fed. Reg. 40992.

In considering the sufficiency of a complaint based upon a restatement, the court must analyze the facts plead concerning the restatement to determine if it is indicative of fraud. Courts subject claims regarding a restatement to the same analysis of pleading particularity as they do with a company's other statements and disclosures. *Chalverus v. Pegasystems, Inc.*, 59 F. Supp. 2d 226, 233 (D. Mass. 1999) (a plaintiff adequately pleads financial fraud based on improper revenue recognition by alleging a particular transaction in which revenues were improperly recorded, the name of the customer, the terms of the transaction, when the transaction occurred, and the approximate amount of the fraudulent transaction); *see also Wells v. Monarch Corp.*, 129 F.3d 1253, No. 97-1221, 1997 WL 693032 at *5 & n. 15 (1st Cir. 1997) (affirming dismissal, despite Ernst having "made many mistakes"; "Other circuits have held that scienter in Section 10(b) actions against accountants or independent auditors is not established merely through a showing of an error of judgment or a misapplication of accounting principles."). As discussed below, applying these standards, the restatement at most indicates innocent errors by Enron and/or its accountants.

b. Enron's Restatement Merely Reflects Accounting Adjustments That Did Not Affect Enron's Financial Condition

The mere existence of the restatement is the only fact plaintiffs plead to support their conclusory allegations of fraud as a result of the restatement. Indeed, they have failed to allege any other specific facts in support of any of their fraud allegations. The restatement had no impact whatsoever on Enron's financial position in 2001, and did not reverse any transactions, or in any way create an inference that the earnings, which were merely eliminated from Enron's income statement as a result of consolidation were, in fact, not actually received by

Enron or due and realizable.[12] The basis for the restatement was a "determination by Enron and its auditors"[13] to: (a) consolidate JEDI and Chewco from January 1, 1997;[14] (b) consolidate an LJM1 subsidiary in 1999 and 2000;[15] (c) reflect prior-year proposed audit adjustments and reclassifications, which previously were determined to be immaterial in the year originally proposed;[16] and (d) reclassification of the notes receivable.[17]

As set forth in Enron's Form 8-K, it was concluded by Enron and its auditors that the structure of the investors' investments in JEDI and the capitalization of the LJM1 subsidiary did not meet specific accounting requirements for nonconsolidation and that those entities should have been consolidated into Enron's own financials, rather than considered separately.[18] The consolidation resulted in eliminating the recordation of earnings Enron had entered in its financial statements. In effect, as a result of the restatement, the transactions which resulted in those earnings were treated as having been intra-company transactions for accounting purposes. Intra-company transactions are eliminated on consolidation – but this does not mean that they did

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[12] (*See generally* SEC J.A. Tab 76, at 2 (after a previously announced adjustment, "[t]hese restatements have no effect on Enron's current financial postion.").)

[13] *Id.* at 1.

[14] JEDI and JEDI's investor Chewco were consolidated apparently due to JEDI's failure to meet the accounting requirements to qualify for nonconsolidation. In the restatement, Chewco was consolidated into Enron's books from 1997 forward and, therefore, the related earnings (loss) and assets (liabilities) were included in Enron's restated reported results. Notably, in the first quarter of 2001, long before the restatement, JEDI had already been consolidated into Enron's books. Therefore, absolutely nothing about Enron's current financial position changed when JEDI was consolidated.

[15] As a result of the restatement, a subsidiary of LJM1 reportedly was consolidated with Enron's results in 1999 and 2000 because of "inadequate capitalization." (SEC J.A. Tab 76, at 5.) LJM1 was involved in a transaction related to the hedging of Enron's merchant investment in the common stock of Rhythms NetConnections. According to the testimony of Arthur Andersen personnel before Congress, there were some complex issues regarding the valuation of various assets and liabilities with respect to LJM1 and they admitted that their initial judgment regarding the initial capital investment of various parties was in error.

[16] As reported in the Form 8-K, "[t]he restatements will also include prior-year proposed audit adjustments and reclassifications which were determined to be immaterial in the year originally proposed." (SEC J.A. Tab 76, at 6.)

[17] Prior to the November 2001 restatement, as part of Enron's purchase of LJM2's equity interest in a transaction named "Raptor" in the third quarter of 2001, Enron recorded a $1.2 billion reduction to shareholders' equity in its third quarter 2001 financial statements. This adjustment was a *non*-cash write-down.

[18] (SEC J.A. Tab 76, at 4-5.)

not in fact occur or that the right to the money represented by the "reversed" earnings did not exist. The legal status of JEDI's obligation to pay or distribute actual cash earned or revenue received on JEDI's assets is not changed by this accounting consolidation. This was not the type of restatement that involved the reversal of phantom income or a fraudulent transaction. To the contrary, this restatement involved real gains by JEDI which were merely eliminated from Enron's financial statements due only to consolidation of JEDI's results with Enron's. No moneys received by Enron from JEDI or due to Enron from JEDI were erased or found not to have existed in the first place, and nothing was changed going forward from a financial perspective. *Id.* at 2. These facts give rise to no inference of fraud.

A similarly stark example of how this "consolidation restatement" lacks, on its face, any indication of fraud whatsoever, is demonstrated by considering what happened to JEDI's assets and liabilities. Much has been made in the press and elsewhere of so-called "hidden debt" off Enron's balance sheets.[19] Debt incurred by JEDI, $711 million, has been referred to as part of this "hidden debt." As a result of the supposed need to consolidate JEDI's financial statements with Enron's, $711 million worth of debt owed by JEDI was placed or consolidated on Enron's financial statements. This accounting adjustment does not change the legal status of that debt. In other words, the mere fact that JEDI is deemed by Enron's auditors not to qualify for unconsolidated treatment, does not change the legal status of whether JEDI is the true obligor of that debt. Likewise, a fact not mentioned in the press or by plaintiffs, as a result of the consolidation restatement, $451 million of assets on JEDI's books also were placed on Enron's books. Thus, the net effect of the consolidation on Enron's balance sheet is an increase in "reported debt" of only $160 million. Similar to the situation with the $711 million

[19] In fact, Enron consistently reported its off-balance sheet debt in the notes to its audited financial statements, including JEDI's debt. *See, e.g.*, Enron (SEC J.A. Tab 15, at 82 (Unconsolidated Equity Affiliates).)

of JEDI debt which was placed on Enron's balance sheet as a result of the consolidation, the legal status of the $451 million of assets placed on Enron's balance sheet is not changed simply because of the consolidation. The accounting convention of consolidation requires that assets and liabilities of the consolidated entity be included in Enron's financial statements. Thus, whatever the reason for the consolidation and the change of view by Enron's auditors as to whether JEDI qualified for unconsolidated treatment by Enron, the restatement in this regard is much ado about nothing.

Concerning the consolidation of the LJM1 subsidiary, the restatement gives minimal explanation, stating only that it was "inadequately capitalized."[20] Enron's auditors testified before Congress that they simply made an accounting misjudgment in allowing it to initially be unconsolidated.[21] Thus, Arthur Andersen has taken responsibility for the initial review of the LJM treatment and for any error in allowing it to be unconsolidated. It is quite inconceivable that that portion of the restatement could serve as the basis for fraud by Enron or Mr. Skilling.

Similarly, the restatement of $87 million of past audit adjustments, which had been deemed immaterial at the time, by their very nature are indicative of an absence of fraud. As reported in the restatement, these are adjustments that were proposed by Arthur Andersen[22] and approved for "passing" or not recording because they were deemed immaterial. Immaterial amounts cannot be the basis for fraud. There is, moreover, no allegation whatsoever that Mr. Skilling did anything other than rely on the judgments made by Enron's internal accountants and outside auditors on all these transactions at the time they were recorded. Indeed, there is no

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[20] (SEC J.A. Tab 19, at 17.)

[21] *See* Remarks of Joseph F. Berardino, Managing Partner, CEO, Arthur Andersen, U.S. House of Representatives, Committee on Financial Services, Dec. 12, 2001.

[22] (SEC J.A. Tab 76, at 1.)

indication or specific fact-based allegation indicating that Mr. Skilling was aware of the particulars of these accounting judgments at the time.

Finally, according to the restatement, it was determined that particular notes receivable had been misclassified. Enron's previously announced $1.2 billion reduction of shareholders' equity primarily involves the correction of the effect of an accounting error made in the second quarter of 2000 and in the first quarter of 2001. *Id.* at 7. This reclassification was the result of an error in the application of GAAP as the amounts were presented as a note receivable instead of a reduction to shareholders' equity. This simple accounting error purportedly resulted in the need to restate the manner in which Enron's shareholders' equity had been previously reported. Once again, there is nothing alleged to tie Mr. Skilling to this error or to sugget that it is anything other than innocent.

2. PLAINTIFFS FAIL TO ALLEGE ANY FACTS SHOWING MR. SKILLING'S KNOWLEDGE OF OR INVOLVEMENT IN ENRON'S ACCOUNTING PRACTICES

Plaintiffs fail to provide specific facts to support that Mr. Skilling was aware of, involved in, or counseled any of the alleged GAAP errors. Because of these deficiencies, plaintiffs allegations of fraud against Mr. Skilling fail and should be dismissed.

a. There Are No Allegations With Respect To Mr. Skilling's Involvement Or Knowledge

There is no inference of fraud by Mr. Skilling that attaches to the restatement, either in fact or based upon plaintiffs' pleadings. The general allegation that "defendants caused the Company to violate GAAP and SEC rules"[23] is insufficient to state a claim against Mr. Skilling under Rule 9(b), and the PSLRA. *Mortensen*, 123 F. Supp. 2d 1022-23. Absent particularized factual allegations with respect to Mr. Skilling, these conclusory allegations are

[23] NCC ¶418.

defective as a matter of law. *In re Sec. Litig., BMC Software, Inc.*, 183 F. Supp. 2d 860, 902 n.45 (S.D. Tex. 2001); *Lemmer v. Nu-Kote Holding, Inc.*, Civ. Act. No. 3:98-cv-0161-L, 2001 U.S. Dist. LEXIS 13978, at *24-25 (N.D. Tex. Sept. 6, 2001).

Plaintiffs fail to allege any facts showing that Mr. Skilling was involved in making any of the original accounting determinations at issue or that he knew or even recklessly disregarded that they were erroneous—let alone fraudulent—when made. Nothing plead in the Complaint suggests that Mr. Skilling knew the financial statements as originally reported were inaccurate in any way or were based on faulty accounting. *Cf. Coates v. Heartland Wireless Communications, Inc.*, 100 F. Supp. 2d 417, 428 (N.D. Tex. 2000) (even if plaintiffs wish to prove scienter by recklessness, they still must allege, with sufficient particularity, that defendants had full knowledge of the dangers of their course of action and chose not to disclose those dangers to investors).

Plaintiffs have failed to allege any facts that give rise to a strong inference that the errors corrected by the restatement involved more than "simple or even inexcusable negligence" on the part of Enron or its accountants. Nowhere in the entire complaint is there a single fact alleged that would, if true, indicate that Mr. Skilling was aware of these errors or that his conduct constituted an "extreme departure from the standards of ordinary care," as would be the minimum showing to satisfy scienter. *Compare Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 408 (5th Cir. 2001); *Meadows v. SEC*, 119 F.3d 1219, 1226-27 (5th Cir. 1997); *Trust Co. v. N.N.P., Inc.*, 104 F.3d 1478, 1490 (5th Cir. 1997); *Lovelace v Software Spectrum*, 78 F.3d 1015; 1018 (5th Cir. 1996); *Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994).

In support of their allegations of fraud with respect to the consolidation of JEDI and Chewco, plaintiffs state that "Chewco was less than 3% owned by parties independent to

Enron" and thus "was improperly excluded from Enron's financial statements despite being controlled by Enron."[24] Additionally, they allege: "Kopper transferred his ownership in Chewco to William Dodson ... this sham transfer was made for the sole purpose of creating the false impression that Kopper, and thus Enron, had no formal interest in Chewco."[25] They further allege that Barclays Bank provided loans for Mr. Dodson's interest resulting in the failure "to qualify as outside equity 'at risk'" to satisfy the accounting criteria to qualify for non-consolidation.[26] There is nothing in this allegation pointing to fraudulent activity. Moreover, but for the conclusory statement that "[t]he problems with the purported independent 'equity' in Chewco were known and openly discussed within Enron," plaintiffs allege nothing with respect to Mr. Skilling.[27] Indeed, the phrase "openly discussed within Enron" fails to meet the minimum standard for pleading with particularity under both Rule 9(b) and the PSLRA.

Similarly, with respect to the consolidation of the subsidiary of LJM1, plaintiffs fail to sufficiently plead any knowledge with respect to Mr. Skilling. They allege that Enron intentionally circumvented GAAP in order to realize an increase in value in its own stock.[28] Enron, according to the Complaint, was able to recognize the "trapped" or "embedded" value in Enron stock by transferring it to the LJM1 subsidiary in a "phony hedge" of a restricted stock, Rhythms NetConnections, owned by Enron.[29] They allege that the use of the value of the Enron stock was "improper."[30] Although the Board had approved of Andrew Fastow's investment in LJM1 and involvement with this transaction, it was later disclosed that other Enron employees

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[24] NCC ¶435.
[25] NCC ¶438.
[26] NCC ¶440.
[27] NCC ¶441.
[28] NCC ¶454.
[29] NCC ¶455-456.
[30] NCC ¶458.

had financial interests in it as well.[31] Subsequently, Enron and its accountants determined that the LJM1 subsidiary did not qualify for non-consolidation treatment because of "inadequate capitalization."[32] The only allegation plaintiffs make to connect Mr. Skilling to this transaction is their claim that he made the decision to sell Rhythms NetConnections stock when its restriction expired.[33] They allege no knowledge by Mr. Skilling of any details whatsoever regarding the hedge or the investment of the other Enron employees. They plead absolutely no facts indicating that Mr. Skilling knew anything but that the stock was hedged and later sold. Neither fact involves any improper activity nor is implicated in the consolidation. Indeed, plaintiffs cannot connect Mr. Skilling to the alleged error in accounting for either JEDI/Chewco or the LJM1 subsidiary. In fact, it would be remarkable if a COO were ever involved to the level of detail wherein the alleged errors occurred.

Rather, it appears that plaintiffs are pleading that Mr. Skilling and the other defendants relied on Arthur Andersen to analyze the accounting treatment of complex transactions under GAAP, which hardly is an extreme departure from standards of ordinary care. As set forth in Section IV.A., *infra*, plaintiffs admit in their Complaint:

> "Andersen...was involved in every facet of Enron's business. Andersen audited Enron's financial statements, it acted as internal auditors for Enron, it prepared Enron's tax returns, it provided consulting services on a wide range of topics and consulted on the accounting for the very transactions at issue in this litigation throughout the Class Period." (NCC ¶ 897.)
>
> "We conducted our audits in accordance with auditing standards generally accepted in the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. ...In our opinion, the financial statements referred to

[31] NCC ¶459.

[32] (SEC J.A. Tab 76, at 5.)

[33] NCC ¶457.

> above present fairly, in all material respects, the financial position of Enron Corp. and subsidiaries...and the results of their operations, cash flows and changes in shareholders' equity... in conformity with accounting principles generally accepted in the United States." (NCC ¶ 903.) *(citing Andersen's representation in a report dated 2/23/01 to the Shareholders and Board of Directors of Enron Corp. in its Annual Report, which plaintiffs represent was substantially identical to representations made by Andersen throughout the Class Period.* (NCC ¶ 904.).)

Likewise, as to the LJM1 subsidiary, plaintiffs plead that "the LJM1 . . . transactions were structured, reviewed and approved by Andersen, Vinson & Elkins, Kirkland & Ellis, the Enron defendants . . . ."[34] Although these conclusory allegations do not suffice against any of the defendants, plaintiffs cannot have it both ways. Any allegation that Enron's auditors and attorneys were intimately involved in a transaction that was later restructured, contradicts and negates any inference plaintiffs hope to obtain from allegations that individual defendants such as Mr. Skilling knew of accounting irregularities on such a transaction, absent very specific factual allegations.[35]

Moreover, Arthur Andersen represented in another opinion letter "To the Shareholders and the Board of Directors of Enron Corp." contained in the same Annual Reports relied upon in the Complaint at 136-140, 215-219, 293-297, 397, and 903-904:

> "We have examined management's assertion that the system of internal control of Enron Corp.... and subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements... In our opinion, management's assertion that the system of internal control of Enron Corp. and its subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements."
>
> In an organization as large as Enron, management must be able to rely on an

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[34] NCC ¶ 23.

[35] Plaintiffs similarly allege that Vinson & Elkins "participated in structuring . . . (Chewco / JEDI and the LJMs), NCC ¶ 98, and proposed the argument that allegedly undercut the original accounting for JEDI and Chewco. NCC ¶ 439.

accounting system where its internal controls have been reviewed and determined to assure reliable financial statements. Thus, far from pleading reckless or knowing behavior by Mr. Skilling, plaintiffs' own Complaint pleads the reasonableness of Mr. Skilling's reliance on Arthur Andersen and the basis for his belief in the accuracy of the financial statements and the accounting methods applied in creating them. Plaintiffs' pleading as to the restatement is deficient under both Rule 9(b) and PSLRA. *Compare Lovelace*, 78 F.3d at 1018; *Coates*, 55 F. Supp. 2d at 634-36.

b. Alleged Seats On Executive Boards And Access To Company Information Is Not Sufficient

Plaintiffs' allegations imply that Mr. Skilling had knowledge of the alleged inaccuracy of Enron's financial statements merely due to his attendance at boards of directors and management meetings. However, conclusory allegations of scienter based upon executive positions, involvement in day-to-day management, access to internal corporate documents, conversations with corporate officers and employees, and their attendance at management and board meetings are not sufficient. *See Branca v. Paymentech, Inc.*, 3:97-cv-2507-L, 2000 WL 145083, at *11 (N.D. Tex. Feb. 8, 2000): ("Allegations that a party knew or should have known that false representations were being made merely by virtue of his position within a company are, as a matter of law, insufficient to plead scienter."); *Lirette v. Shiva Corp.*, 27 F. Supp. 2d 268, 283 (D. Mass. 1998) (finding that "inferences that the defendants, by virtue of their position[s] within the company, 'must have known, about the company's problems when they undertook allegedly fraudulent actions' . . . are precisely the types of inferences which this court, on numerous occasions, has determined to be inadequate to withstand the special pleading requirements in securities fraud cases."). These allegations simply do not support any inference of scienter.

c. Standards Of Ordinary Care Require Mr. Skilling's Deference To CFO, CAO, And Outside Auditors With Respect To Assessing The Accounting Aspects Of Complex Transactions

With respect to the determination as to the original accounting treatment for JEDI, Chewco, and the LJM subsidiary, Mr. Skilling was permitted to rely on the many managers identified in plaintiffs' Complaint as having had involvement in or responsibility for such decisions, including Enron's Chief Financial Officer, Chief Accounting Officer, and Chief Risk Officer – as well as Enron's outside auditors. Because plaintiffs must show an "extreme departure from standards of ordinary care," and because they have plead nothing to negate Mr. Skilling's ability to rely on those persons, the allegations regarding the restatement are inadequate as to Mr. Skilling, even if facts are plead demonstrating that someone made an error or even engaged in fraud. *Compare Mortensen*, 123 F. Supp. 2d at 1026 ("The party must know that it is publishing materially false information, or the party must be severely reckless in publishing such information"). *In re George W. Phillips*, Administrative Proceeding File No. 3-8145, 1994 SEC LEXIS 2657, at *17 (Aug. 26, 1994) (A company's top management is entitled to rely on the financial staff's representations that it has accurately reported financial results.) Indeed, the contrary is true. It would have been extremely unusual—and perhaps questionable—for Mr. Skilling, as Chief Executive Officer, to supplant his own judgment for that of these finance and accounting personnel on issues relating to the proper application of GAAP to the financial reporting of complex transactions. *Id.* (It is reasonable for a CEO to believe that members of his senior management are "carrying out their professional duties honestly.") Once again, plaintiffs are unsuccessful in pleading Mr. Skilling's scienter and therefore, their claim must fail. *Coates*, 100 F. Supp. 2d 417, 428 (plaintiffs' attempt to plead scienter was insufficient because they had failed to allege specific facts with respect to why defendant's behavior was severely reckless.)

B. PLAINTIFFS' ALLEGATIONS THAT ENRON ENGAGED IN FRAUDULENT BUSINESS PRACTICES ARE INSUFFICIENT TO STATE A CLAIM AGAINST MR. SKILLING

The second component of plaintiffs' claim under Section 10(b) is based upon allegations of certain fraudulent or improper business practices at Enron. These allegations, like Enron's restatement of earnings, are insufficient to state a cause of action against Mr. Skilling. ***First***, while the Consolidated Complaint makes numerous disparaging claims regarding the operation of Enron's business, plaintiffs have failed to allege with sufficient particularity that any of Enron's business practices were in fact fraudulent, as opposed to pleading plaintiffs' beliefs or criticisms of the defendants' business judgment or that certain areas of Enron's business involved certain risks. ***Second***, plaintiffs fail to plead any specific facts that tie Mr. Skilling to the allegedly fraudulent business practices. The allegations (i) improperly and indiscriminately group defendants together; (ii) fail to detail necessary and minimum facts that adequately identify and support the claims of fraud (even mismanagement) with respect to Mr. Skilling; and (iii) inappropriately attempt to plead as facts mere conclusions as to purported fraud and Mr. Skilling's intent or knowledge.

According to plaintiffs, "[e]ach defendant is liable for ... participating in a scheme to defraud and/or a course of business that operated as a fraud or deceit on purchasers of Enron's public securities during the Class Period."[36] To support this overarching, conclusory allegation, plaintiffs rely, in large part, on several general assertions about fraudulent or improper business practices at Enron, which are repeated and restated throughout the Consolidated Complaint. These allegations generally fall into the following categories. Allegations that Enron:

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[36] NCC ¶ 394.

- Fraudulently conducted its Wholesale business (WEOS) by (i) engaging in deceptive transactions, including improper hedges with related parties,[37] and (ii) abusing mark-to-market accounting, including "moving the curve";[38]

- Fraudulently conducted its Retail business (EES) by (i) abusing mark-to-market accounting[39] and (ii) engaging in deceptive transactions;[40]

- Fraudulently conducted its Broadband business (EBS) by (i) engaging in fraudulent transactions, including allegedly valueless dark fiber swaps,[41] and (ii) improperly accelerated or booked earnings on contracts;[42] and

- Fraudulently conducted its International business by (i) overpaying for assets[43] and (ii) improperly failing to write down those assets or their related expenses.[44]

As we show below, although these groups of allegations appear in several permutations throughout the Complaint. None of the variations—whether rote allegations repeated verbatim at regular intervals, or allegations that purport to specify examples of fraud – are sufficiently pled to form the basis of a claim against Mr. Skilling.

1. THE ALLEGATIONS OF IMPROPER OR FRAUDULENT BUSINESS PRACTICES CANNOT STATE A CLAIM AGAINST MR. SKILLING BECAUSE THEY ARE VAGUE AND CONCLUSORY

a. Allegations Regarding Enron's Business Practices Fail To Plead Any Specific Facts To Support Fraud Or Impropriety

Despite the Complaint's continual refrain that the above described business practices were fraudulent or improper, plaintiffs have failed to adequately specify any facts to support those claims. Indeed, as the Joint Brief sets forth in detail, allegations regarding Enron's

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[37] *See, e.g.*, NCC ¶¶ 385, 467-475.

[38] *See, e.g.*, NCC ¶¶ 36, 121(e), 155(e), 214(e), 300(e), 339(e), 418, 426, 533, 651(c), 935.

[39] *See, e.g.*, NCC ¶¶ 38, 155(f-g), 214(f-g), 300(f-g), 339(f-g), 533-548, 613, 615, 640.

[40] *See, e.g.*, NCC ¶¶ 38, 59, 155(e), 214(g, i), 300(g, i), 339(g, i), 358, 533-548, 557, 613, 615, 640.

[41] *See, e.g.*, NCC ¶¶ 43, 214(h-l), 300(h-j, o), 339(h-j, o), 361, 529.

[42] *See, e.g.*, NCC ¶¶ 40, 300(m-o), 339 (m-o), 520, 525, 546.

[43] *See, e.g.*, NCC ¶¶ 14(a), 69, 112, 121(f, h),137, 142, 155(h, n, i), 169, 178, 189-90, 214(m), 216, 273, 279, 305, 309, 314, 327, 330, 337, 342, 388, 581-82, 591, 598-602, 614, 680, 701, 739, 779.

[44] *See, e.g.*, NCC ¶¶ 121(f), 155(j, k), 581.

accounting methods, transactions with related parties, and conduct within certain business units generally, ***all*** fail to adequately plead securities fraud under the PSLRA and Fed. R. Civ. P. 9(b). *See* Joint Brief at III.D. (mark-to-market accounting was neither improper or fraudulent, and was, indeed required); at II.B.5-7 (plaintiffs fail to plead fraud with respect to related party transactions); at V.A. (no adequate allegations of fraud regarding Enron's Wholesale business); at V.C. (no adequate allegations of fraud regarding Enron's Retail business); at V.B. (no adequate allegations of fraud regarding Enron's Broadband business); at V.D. (no adequate allegations of fraud regarding Enron's International business).[45] Since plaintiffs have failed to plead any fraudulent or improper business practices with the particularity required under the securities laws, they cannot state a claim under Section 10(b) against Mr. Skilling.

b. Allegations That Enron's Business Practices Were Improper Or Fraudulent Are Insufficiently Group Pled As To Mr. Skilling

Throughout the Consolidated Complaint, plaintiffs repeatedly attempt to connect Mr. Skilling to Enron's allegedly improper business practices by lumping him with a large group of other defendants. Plaintiffs' repeatedly refer to what the "Enron Defendants" or Enron's "officers," did or knew.[46] Such allegations lack any specific facts as to Mr. Skilling, and are inappropriate as a matter of law.[47]

"[T]he PSLRA requires plaintiffs to 'distinguish among those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud.'" *Schiller v. Physicians Res. Group, Inc.*, 2002 WL 318441, at *5 (N.D. Tex. Feb. 26, 2002) (quoting *In re*

[45] As noted above, in the interests of efficiency and so as not to burden the Court with unnecessary duplication, Mr. Skilling incorporates these arguments from the Joint Brief by reference, specifically reserving his right to take contrary positions in the future.

[46] *See infra* notes 114-116 and accompanying text.

Silicon Graphics, Inc., 970 F. Supp. 2d 746, 752 (N.D. Cal. 1997) (emphasis in *Schiller*). By contrast, plaintiffs' pleading style makes clear their hope that by throwing enough general accusations in Mr. Skilling's direction, something might stick. For example, plaintiffs' conclusively allege:

- Enron Defendants reviewed, signed, and authorized materially misleading SEC filings, press releases, and other public statements.[48]
- "The LJM1 and LJM2 transactions were structured, reviewed and approved by Andersen, Vinson & Elkins, Kirkland & Ellis, the Enron Defendants and certain of Enron's bankers, which also helped create and finance the LJM partnerships and these transactions."[49]
- "These transactions were not economic hedges. ... The Enron Defendants, Andersen, Vinson & Elkins, Kirkland & Ellis and Enron's banks used these contrivances and manipulative devices to inflate Enron's reported financial results...."[50]
- "The day-to-day business of Enron was conducted by Enron's top executives and its 'Management Committee,' a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron's business. The Management Committee was aware of and approved all significant business transactions of Enron, including each of the partnership/SPE deals specified herein."[51]
- "Enron Defendants engaged in several accounting manipulations with respect to broadband...."[52]

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[47] This same reasoning applies where Plaintiffs simply name Mr. Skilling as but one member of a number of def fendants to whom knowledge and acts are ascribed generally, without providing any factual basis that specifies what Mr. Skilling, in particular, did or knew.

[48] *See, e.g.*, NCC ¶¶ 14, 37, 39, 54, 67, 89-90, 109-110, 119, 121, 126, 129, 134, 136-141, 145, 155, 157, 160, 164, 167, 175, 178, 184, 191-192, 197, 202, 213, 214, 215-221, 228, 232, 247, 263, 264, 271-272, 274, 282-283, 286, 289, 292-298, 300, 309, 311, 316-318, 328-332, 336-337, 339, 394.

[49] NCC ¶ 23. *See also, e.g.*, NCC ¶ 24 ("Defendants knew that because LJM2 was going to be utilized to engage in transactions with Enron where Enron insiders would be on both sides of the transactions, the LJM2 partnership would be extremely lucrative – a deal that was virtually guaranteed to provide huge returns to LJM2's early investors as the Enron Ponzi scheme went forward.").

[50] NCC ¶ 33.

[51] NCC ¶ 88. *See also, e.g.*, NCC ¶ 397 ("The Enron Defendants who were on Enron's Management Committee were the top executives of Enron. They had daily contact with each other while running Enron as 'hands-on' managers, dealing with the important issues facing Enron's business, *i.e.* WEOS, EES, EBS, its JEDI and LJM partnerships and the related SPEs and Enron's future revenues and profits.").

[52] NCC ¶ 520. *See, also, e.g.*, NCC ¶ 534 ("Enron Defendants knew there was no historical track record for many of the transactions to which Enron applied mark-to-market accounting."); NCC ¶536 ("The Enron Defendants

- "Enron Defendants also engaged in deceptive transactions with certain banking defendants to disguise loans to the Company as hedging or derivative transactions."[53]

- "Enron Defendants knew that the assets would not provide the benefits estimated when they were acquired, but in order to report inflated earnings to investors, did not take required writedowns."[54]

- "Enron Defendants" and others restructured related party transactions.[55]

The sheer volume of plaintiffs' allegations that follow this format cannot save them from dismissal. Even if plaintiffs adequately pled what these "groups" did, when they did it, and how what they did was fraudulent (which they do not), none of these allegations are directed with any specificity at Mr. Skilling.

Moreover, Plaintiffs' allegations do nothing more than assert as fact, the conclusion that a link exists between Mr. Skilling's positions while at Enron and his actual knowledge or involvement in certain supposedly fraudulent activities. At best, plaintiffs attempt to allege that because certain transactions were "highly structured and complex," they thus required the "personal attention of several top executives of Enron" as well as "the review and approval of board members." From this allegation, they conclude that "it is logical" that "all Enron's officers and directors" knew or recklessly disregarded the purported falsification of Enron's financial statements relating to these transactions.[56] However, approval of these

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recorded income from these contracts even though they realized that once the contracts began to be performed, many would become losses because the cost, price and other assumptions were never valid to begin with.").

[53] NCC ¶ 558. *See also, e.g.,* NCC ¶¶ 653, 675, 694, 716, 736, 751, 763, 774, 788 ("top officials of the [investment banks dealing with Enron] constantly interacted with top executives of Enron, i.e., Lay, Skilling, Causey, McMahon or Fastow, on an almost daily basis throughout the Class Period, discussing Enron's business, financial condition, financial plans, financing needs, partnerships, SPEs and Enron's future prospects....").

[54] NCC ¶ 587. *See also, e.g.,* NCC ¶¶ 591, 597, 601 (making general allegations regarding the role and knowledge of "Enron Defendants" with respect to valuing Azurix, The New Power Company, and the Dabhol power plant, respectively).

[55] *See, e.g.,* NCC ¶¶ 305, 313, 463, 490. In addition to the paragraphs delineated *supra*, numerous other allegations improperly engage in group pleading,. *See, e.g.,* NCC ¶¶ 10, 155, 300(j)(i), 387, 400, 548, 861, 910, 913, & 941.)

[56] NCC ¶ 395 ("... Further, not only were these transactions large, frequent, widespread and often at quarter-end, they were also highly structured and complex, requiring the personal attention of several top executives of Enron,

transactions by a host of Enron officials does not necessarily lead to the conclusion that they all would have or should have recognized any irregularity in those transactions, even if some existed, especially where the transactions were "highly structured and complex," and where the plaintiffs plead that outside professionals, including Arthur Andersen and Vinson & Elkins, "structured, reviewed and approved."[57] It is exactly this type of imprecise and unsupported inference which the PSLRA forbids, and which courts within the Fifth Circuit have consistently rejected as insufficient group pleading. *See, e.g., In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 902 n.45 (S.D. Tex. 2001) ("Because this Court believes a more stringent pleading is required by the PSLRA, it agrees . . . the group pleading doctrine is at odds with the PSLRA and has not survived the amendments.").[58]

These general, conclusory allegations do not specify what ***Mr. Skilling*** did, what meetings ***he*** attended, what decisions ***he*** made or failed to make, with whom ***he*** spoke, what ***he*** said, what documents ***he*** saw, drafted, commented on, or edited, or what ***he*** knew and when ***he***

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especially those sitting on the Enron Management Committee, and the review and approval of board members, especially those sitting on the Enron Board's Executive, Finance and Audit Committees, which had direct jurisdiction over these types of corporate transactions and activities. Thus, it is logical, if not obvious, that all of Enron's officers and directors knew of, or at a minimum acted in reckless disregard of, the falsification of Enron's financial reports and the other false and misleading statements being made about its business operations.").

[57] NCC ¶¶ 23. Indeed, plaintiffs' have plead that Enron in fact took reasonable steps to seek the advice of its auditors and lawyers for virtually all the transactions of which plaintiffs now attempt to complain and accuse the defendants of fraud.

[58] *See also, e.g., Schiller,* 2002 WL 318441 at *6 (dismissing claims because "the complaint is replete with instances of ... group pleading," and holding that "Plaintiffs cannot avoid the bar on group pleading by simply identifying the constituents of a group of defendants in rote and conclusory fashion"); *Lemmer v. Nu-Kote Holding, Inc.*, No. 3:98-CV-0161-L, 2001 WL 1112577, at *7 (N.D. Tex. Sept. 6, 2001) ("The group pleading doctrine is inconsistent with the particularity requirements of [the] PSLRA...."); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, No. 4:00-CV-355-Y, slip op. at 6 (N.D. Tex. March 12, 2001) ("The Court initially finds that Plaintiffs' complaint fails because of its reliance on group pleading."); *Calliot v. HFS, Inc.*, No. 3:97-CV-09241-I, 2000 WL 351753, at * 5 (N.D. Tex. Mar. 31, 2000) (dismissing complaint based, in part, on failure to specify allegations with respect to each individual defendant, as evidenced by group pleading); *Branca v. Paymentech, Inc.*, No. 3:97-CV-2507-L, 2000 WL 145083, at *8 (N.D. Tex. Feb. 8, 2000) (same); *Zishka v. Am. Pad & Paper Co.*, No. 3:98- CV-0660-M, 2000 WL 1310529, at *1 (N.D. Tex. Sept. 13, 2000) ("[T]his Court rejects the notion of 'group pleading,' and 'group publication' and concludes that such concepts ... did not survive the adoption of the PSLRA."); *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 (N.D. Tex. 1998) ("The PSLRA codifies a ban against group pleading.").

knew it. In short, because plaintiffs fail to allege any Skilling-specific facts or his personal knowledge of supposed group fraud or improprieties, these allegations fail to state a claim against him.[59] *See, e.g.*; *In re BMC Software*, 183 F. Supp. 2d at 902 n.45; *Schiller*, 2002 WL 318441 at *6; *Silicon Graphics*, 970 F. Supp. at 752. As discussed below, even where plaintiffs make allegations specific to Mr. Skilling, these allegations are nothing more than the plaintiffs' beliefs, and aspirations for facts.

c. Allegations Of Mr. Skilling's Knowledge Of Or Participation In Enron's Improper Or Fraudulent Business Practices Fail To Specify The Who, What, Where, When And How Of The Supposed Fraud

As noted above, plaintiffs have the burden to set forth specific allegations of Mr. Skilling's participation in and knowledge of Enron's allegedly fraudulent business practices. Plaintiffs' effort to carry this burden, however, cannot be sustained through vague and conclusory allegations. *See, e.g., Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (holding allegations that state conclusions without the benefit of specific facts or explanations, cannot withstand the heightened pleading requirements under the PSLRA); *Schiller*, 2002 WL 318441, at *4, ("To satisfy Rule 9(b) and the PSLRA, a plaintiff must plead facts and avoid reliance on conclusory allegations.") (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)); *In re BMC Software,* 183 F. Supp. 2d at 886 ("[Plaintiffs] fail to show which of the statements are misrepresentations and to specify the reasons why they are false or misleading or how they relate to the 'true but concealed facts.'"); *Coates*, 26 F. Supp. 2d

[59] Indeed, Plaintiffs' convenient and unabashed use of the term "Enron Defendants" to short-cut the PSLRA's pleading standards completely fails to acknowledge the practical effect of Mr. Skilling's resignation on August 14, 2001, instead continuing to lump him together with other individual defendants even after he left Enron. *See, e.g.*, NCC ¶ 387 ("Notwithstanding the write-offs and restated revelations of 10/01-11/01, the Enron Defendants, JP Morgan and CitiGroup believed that they could limit their legal exposure for participation in the scheme if they could effectuate a sale of Enron to another company....").

at 915 (N.D. Tex. 1998).[60]

Plaintiffs' 500-page Consolidated Complaint manages to make only a handful of allegations specifically regarding Mr. Skilling's role in or knowledge of Enron's allegedly fraudulent business practices. Even among those, the allegations specific to Mr. Skilling are simply inadequate to state a claim and are indicative of the endemic lack of particularity in the Consolidated Complaint. These allegations fall into four general categories, each of which we address below.

(1) Allegations That Mr. Skilling Failed To Respond To Internal Complaints Fail To State A Claim.

The first category involves claims of Mr. Skilling's receipt of internal complaints and subsequent lack of response. For example, plaintiffs allege that:

> The managing directors [of EBS] met with Skilling and informed him that EBS was in extremely dire straits – there was "no way to win," EBS "had no income," and the "cash-burn rate was too high." They showed Skilling actual EBS performance numbers. Rejecting their request, Skilling neither replaced Rice and Hannon nor did he make any changes, other than having the managing director also now report to him directly to keep him updated on the disaster in EBS.[61]

Yet, if the PSLRA standards are to have any meaning, a vague reference to a meeting, sprinkled liberally with unidentified quotations, can not satisfy pleading requirements under the statute.

This allegation ***fails*** to specify the date of the supposed meeting, ***fails*** to name any of the attendees (aside from Mr. Skilling), ***fails*** to enumerate, explain or even describe the "actual EBS performance numbers" (much less reference the particular document(s) allegedly

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[60] *Accord, e.g., San Leandro Emergency Med. Group Profit Sharing Plan v. Phillip Morris Cos., Inc.*, 75 F.3d 801, 813 (2d Cir. 1996) (no "license to base" § 10(b) claims "on speculation and conclusory allegations"); *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994) (complaint deficient where plaintiff simply "couple[d] a factual statement with a conclusory allegation of fraudulent intent").

shown to Mr. Skilling) and thus necessarily ***fails*** to specify how these "actual" numbers differed (if at all) from reported numbers,[62] and ***fails*** to specify what "changes" these unidentified employees allegedly requested. More importantly, perhaps, plaintiffs do not even bother to allege how or why the presentation of EBS's unspecified "dire straits" conferred on Mr. Skilling knowledge of fraud, or how his reaction was in any way improper, fraudulent, or indicative of fraudulent intent. Besides, by plaintiffs' own allegations, Enron's eventual downsizing and dismantling of EBS due to prevailing market conditions belies inferences that Mr. Skilling, or anyone at Enron, ignored setbacks in the broadband business.[63] These allegations simply fail to allege how these statements, even if made, relate to fraud. The purported complaints to Mr. Skilling merely raise an issue in hindsight about past business judgments. Such second-guessing of business strategies that ultimately result in losses to a company does not provide the stuff of fraud.[64]

In even less specific terms, plaintiffs cite to the double-hearsay of Sherron Watkins to allege that Mr. Skilling was forewarned of Enron's purported accounting frauds, before his resignation, through complaints from Jeff McMahon and Cliff Baxter.[65] The referred

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[61] NCC ¶ 300(j)(iii).

[62] Enron consistently reported losses from EBS. (*See, e.g.,* SEC J.A. Tab 13, at 9 (reporting a loss before interest, minority interests and taxes for the first half of 2000 of $8 million in EBS); SEC J.A. Tab 14, at 9 (reporting $20 million loss in EBS for the quarter); SEC J.A. Tab 15, at 9 (reporting $60 million loss in EBS over FY 2000); SEC J.A. Tab 17, at 9 (reporting $35 million loss in EBS for the quarter); SEC J.A. Tab 18, at 10 (reporting $102 million loss in EBS in first half of 2001).

[63] The Joint Brief exhaustively explains the appropriateness of Enron's reporting of EBS financial progress and the management of that business generally. *See* Joint Brief at V.B.

[64] *See, e.g., Melder v. Morris*, 27 F.3d 1097, 1101 n.8 (5th Cir. 1994) ("These allegations boil down to plaintiffs' attempt to chastise as fraud business practices that, in hindsight, might have been more cautious. Misjudgments are not, however, fraud."); *Tuchman*, 14 F.3d at 1070 (5th Cir. 1994) ("corporate mismanagement does not, standing alone, give rise to a 10b-5 claim"); *accord, e.g., Colin v. Onyx Acceptance Corp.*, No. 01-55499, 2002 WL 460830, at *1 (9th Cir. Feb. 14, 2002) (holding section 10(b) of Securities Exchange Act does not embrace causes of action for corporate mismanagement); *Werner v. Werner*, 267 F.3d 288, 299 (3d Cir. 2001) (holding that claims grounded in improper management are not actionable under Section 10(b)). The Supreme Court long ago held that allegations of mismanagement do not state a claim for securities fraud. *Santa Fe Indus. v. Green*, 430 U.S. 462, 463 (1977).

[65] *See* NCC ¶¶ 59, 340, 850 (quoting a letter Sherron Watkins sent to Mr. Lay after Mr. Skilling's resignation).

statements of Ms. Watkins, however, reflect nothing more than Ms. Watkin's assertions and opinions as to unspecified purported conversations. Notwithstanding the obvious lack of reliability of Ms. Watkin's purported statements, these are nothing more than additional impossibly vague and conclusory allegations.

While plaintiffs have repeatedly pasted portions of Ms. Watkins' letter in their Consolidated Complaint, they have not even bothered to specify or explain ***what*** the alleged complaints of Mr. McMahon and Mr. Baxter concerned, or ***how*** those complaints, in any way, demonstrate Mr. Skilling's foreknowledge of fraud or participation in the same. Plaintiffs have adopted the vague and unsupported accusations Ms. Watkins made in a letter after Mr. Skilling's resignation in August of last year, while simultaneously ignoring publicly available and widely-disseminated statements that have come to light subsequent to that, which – at the very least provides details of the meetings – and, more importantly, directly refutes Ms. Watkin's clearly unsupported conclusions.[66]

(2) Allegations That Mr. Skilling Directed Others Fail To State A Claim

The Consolidated Complaint often implies that Mr. Skilling supplied the impetus for the alleged fraudulent business practices, yet in only rare instances do plaintiffs articulate allegations that specifically identify Mr. Skilling's supposed role in this regard. In one such example, plaintiffs allege that:

> [A]n international accounting officer repeatedly told Enron's CAO Causey that a writedown had to be taken because so many proposals were no longer even arguably viable. But this ran counter to corporate directives. Causey, at Skilling's direction,

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[66] *See, e.g.*, Hearing Of The Oversight And Investigations Subcommittee Of The House Energy And Commerce Committee (Feb. 7, 2002) ("REP. DEGETTE: No, I know, but I'm talking about you, because you had concerns in March of 2000. And now here's Sherron Watkins coming forward with concerns over a year later, well over a year later. Did you take the opportunity then to say to Mr. Lay, 'You know, back a year and a half ago, before I got transferred, I also had some concerns about the company's financial structures'? Did you talk to him about it? MR. MCMAHON: No, ***Ms. Watkins' and my concerns were radically different....***") (emphasis added).

> routinely responded that 'corporate didn't have room' to take a write-off because doing so would bring Enron's earnings below expectations[67]

Despite naming Mr. Skilling as the particular person who allegedly directed Mr. Causey's response, the Consolidated Complaint neglects to plead any relevant particulars as necessitated by the PSLRA and necessary to adequately defend the allegation. And, again, plaintiffs fail to allege why this "writedown" issue constituted a fraud, how and to what extent, if at all, it affected Enron's financials and why the issue does not merely involve an ordinary business judgment decision, as opposed to fraud.[68] *See, e.g., In re Glenfed, Inc. Sec. Litig.,* 41 F.3d 1541, 1549 (9th Cir. 1994) ("[B]oth the valuation of assets and the setting of loan loss reserves are based on flexible accounting concepts, which, when applied, do not always (or perhaps ever) yield a single correct figure. In order to allege the circumstances constituting fraud, plaintiff must set forth facts explaining why the difference between the earlier and the later statements is not merely the difference between two permissible judgments, but rather the result of a falsehood.").

Other particulars missing from plaintiffs allegations necessary to withstand a motion to dismiss include: (1) ***who*** the international accounting officer was; (2) ***when*** Mr. Skilling directed Mr. Causey; (3) ***how*** Mr. Skilling directed Mr. Causey (whether personally or through third-parties, whether by verbal instructions or formal memoranda, etc.); (3) ***what*** Mr. Skilling's directions actually were and ***what*** assets they regarded—without which it is impossible to determine the extent to which Mr. Causey's alleged actions followed or differed from Mr.

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[67] *See, e.g.,* NCC ¶¶ 122, 155, 214, 500, 581.

[68] *See also, e.g., Vachon v. Baybanks, Inc.*, 780 F. Supp. 79, 81 (D. Mass. 1991) ("A bank's calculation of loss reserves reflects an internal corporate decision. Congress through § 10(b), did not attempt to regulate such decisions."); *Melder*, 27 F.3d, 1101 n.8 ("These allegations boil down to plaintiffs' attempt to chastise as fraud business practices that, in hindsight, might have been more cautious. Misjudgments are not, however, fraud."); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 746 (7th Cir. 1997) ("Hindsight is not the test for securities fraud.").

Skilling's alleged directions on whether the result was material; or (4) ***why*** Mr. Skilling's alleged directions not to take a write-off (of the unidentified assets) were fraudulent and evidenced his knowledge of and intent to perpetuate such a fraud ***at the time***. Thus, this allegation—despite its identification of Mr. Skilling—does nothing to implicate Mr. Skilling in securities fraud because it pleads neither specific facts evidencing actual fraud, nor facts sufficient to give rise to a strong inference of scienter on his part.[69]

Plaintiffs' also make allegations that specifically identify Mr. Skilling as directing, generally, Enron's improper or fraudulent use of mark-to-market accounting.[70] Similarly, however, the Consolidated Complaint falls well short of its burden in this regard. Though seeping with the implication and conclusion of fraud and intent, such blanket accusations are both woefully imprecise and irrelevant. They do not identify when or how Mr. Skilling supposedly dictated the use of mark-to-market accounting, or, importantly, why such direction evidenced fraud or fraudulent intent on his behalf. Importantly, as stated clearly in the Joint Brief, Enron's use of mark-to-market accounting was not only legitimate, but was required in many instances, and followed prescribed standards set by controlling authority.[71]

(3) Allegations Regarding Mr. Skilling's Role In Forming, Adjusting, Or Discontinuing Hedging Activities Fail To State A Claim.

Plaintiffs likewise make sweeping allegations that Mr. Skilling had a personal role

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[69] *See infra*, Section II.D.

[70] *See, e.g.*, NCC ¶ 548 ("It was commonly known within EBS that mark-to-market accounting for broadband was inappropriate because broadband was not a proven market. It was also well known that Lay and Skilling wanted this aggressive revenue recognition to 'incentivize the sales guys.'"); NCC ¶ 939 ("Enron started using mark-to-market accounting more aggressively in the early 90s when Skilling wanted to book profits faster."). To the extent NCC ¶ 548 fails to distinguish between Mr. Lay and Mr. Skilling, and fails to identify the speaker of the alleged quote, this paragraph is also improperly group pled, as set forth *supra*.

[71] As set forth more fully in the Joint Brief in Section III.D., plaintiffs' allegations regarding mark to market accounting fail, as a matter of law, because: (1) Enron's use of mark-to-market accounting was not only proper, but it was mandated; (2) Enron fully disclosed its MTM accounting practices and their affects; and (3) Plaintiffs fail to adequately plead fraud under the PSLRA in support of their claims of alleged "misuse" of mark-to-market

Moreover, where the plaintiffs attempt to link these allegations of facially justifiable motives and decisions to some allegation of fraud or fraudulent intent, they do so by attempting merely to disguise conclusions as fact. For example, plaintiffs state that Mr. Skilling's alleged decision to liquidate the RhythmsNet hedge "alone indicates that Skilling was aware of the impact of the sham hedging transactions on Enron, as well as the improper non-consolidation of the SPE by Enron."[77] The terms "sham" and "improper," however, do not, by their mere utterance, turn an inadequate allegation into one supporting a claim of fraud.[78] Thus, plaintiffs' ***conclusion*** that the RhthymsNet hedge was a sham and the ***conclusion*** that non-consolidation was improper are combined to form the basis of the *non sequitur* that Mr. Skilling – for unspecified reasons – must have known of the sham and impropriety. Even to the extent plaintiffs' attempt to demonstrate the fraudulent nature of this hedge by alleging that the general structure of the hedge violated GAAP (*see* NCC ¶¶ 454-58), the Complaint is bereft of any factually specific allegations that Mr. Skilling was either: (i) aware that the hedge was arranged as described by plaintiffs; or (ii) that he knew or was reckless in not knowing such an arrangement was fraudulent.

Likewise, plaintiffs allegations regarding Mr. Skilling's role in the Raptor-related hedges is fatally indistinct and conclusory. As to Mr. Skilling's involvement in the Raptor-related hedges, plaintiffs allege merely that Mr. Skilling: (i) "was behind the decision to create

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practices that, in hindsight, might have been more cautious. Misjudgments are not, however, fraud."); *Eisenstadt*, 113 F.3d at 746 ("Hindsight is not the test for securities fraud.").

[77] NCC ¶ 457.

[78] *See, e.g., Minger v. Green*, 239 F.3d 793, 799 (6th Cir. 2001) ("[T]he Rules require that we not rely solely on labels in a complaint, but that we probe deeper and examine the substance of the complaint. Indeed, this court has made clear that the label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states.") (internal quotations omitted); *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1263 (10th Cir. 2001) ("We decide cases [under the PSLRA] on facts, not labels ... under the PSLRA ... pleading conclusory labels ... will not suffice.").

the Raptors;"[79] and (ii) "told employees that fixing the Raptors' credit capacity problem was one of the Company's highest priorities."[80] Both of these claims, however, are unavailing as a matter of law for several reasons.

Plaintiffs make no attempt to explain what they mean by, or the significance of, their allegation that Mr. Skilling was "behind" Enron's decision to use the Raptor hedges. Indeed, by plaintiffs own allegations, the entire Enron Board of Directors initially voted to approve the Raptor-related hedges, based upon the recommendations and sign-offs from a bevy of both internal and external auditors and lawyers.[81] Plaintiffs fail to allege any specific facts that Mr. Skilling had a separate and unique role in this process, much less what that implied role encompassed.

Importantly, the Consolidated Complaint does not specify how Mr. Skilling's role, whatever its extent, constitutes or evidences fraud. Their unspecified claim that Mr. Skilling "was behind the decision" does not, in itself, form the basis of fraud – despite plaintiffs' contrary implications. Plaintiffs attempt to discredit the legitimacy of the Raptor-related hedges in hindsight, by alleging, in a conclusory fashion, that the hedges "artificially inflat[ed] Enron's profits while concealing billions dollars in debt"[82] and by purporting to set forth the illegitimate structure and administration of those hedges.[83] Even overlooking the overarching failure of plaintiffs vague and conclusory allegations, as to Mr. Skilling specifically, the Consolidated Complaint fails to allege or specify that Mr. Skilling was either: (i) aware that the Raptor hedges were structured or designed as plaintiffs have alleged; or (ii) that he knew or was reckless in not

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[79] NCC ¶ 465.
[80] NCC ¶ 490.
[81] *See, e.g.*, NCC ¶¶ 377, 460, 479, 800.
[82] *See, e.g.*, NCC ¶ 24.
[83] *See, e.g.*, NCC ¶¶ 33-35, 62, 462.

knowing that such an arrangement was improper in the least, much less fraudulent. The bare statement that the Raptors were set up through the employ of various, unspecified "artifices," fails to connect Mr. Skilling with knowledge of or participation in such purported deceptiveness. Plaintiffs have pled no specific facts to suggest that Mr. Skilling was aware, of should have been aware, that the Raptor-related hedges were structured or accounted for contrary to GAAP or any other accounting or financial authorities, or were designed or managed in a manner to improperly "inflate" earnings or "hide" debt. Without these specifics, plaintiffs cannot hold Mr. Skilling liable under Section 10(b) by alleging merely that Mr. Skilling was "behind" Enron's decision to implement the Raptor hedges.

In the same manner, plaintiffs' implication that Mr. Skilling committed fraud or was aware of fraudulent behavior solely by purportedly telling "employees that fixing the Raptors' credit capacity problem was one of the Company's highest priorities,"[84] is insufficient to state a claim. First, the allegation is impermissibly unspecific as it fails to identify to whom Mr. Skilling allegedly made this statement or when. Further, Mr. Skilling's alleged statement reflects no fraud on its face. As stated previously, the desire to deal with debt issues in a financing vehicle is not, in and of itself, fraudulent. Indeed, the fact that certain of Enron's hedging vehicles had stock "triggers" was fully disclosed,[85] and Mr. Skilling's alleged statement suggests nothing more than a legitimate desire to protect Enron from the consequence of those known risks. Again, basing pleadings on justifiable business decisions which, in hindsight, have been alleged as improper do not state a foundation for a fraud claim without more.

Finally, plaintiffs fail to state any facts to suggest that this alleged statement

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[84] NCC ¶ 490.

[85] *See, e.g.*, Enron's 1998 10-K, J.A. (SEC) (T. 6), at 60 ("Enron is a party to certain financial contracts which contain provisions for early settlement in the event of a significant market price decline in which Enron's common stock falls below certain levels ....").

demonstrates that Mr. Skilling was participating in or was aware of the purported deception facilitated by the Raptor hedges. Plaintiffs pile a considerable volume of allegations regarding the allegedly deceptive nature of the Raptor restructuring.[86] Yet, significantly, ***nowhere*** in their complaint do plaintiffs specify whether, how or when Mr. Skilling participated in those adjustments. ***Nowhere*** do they plead specifics reflecting when or if Mr. Skilling knew or should have known about those specific adjustments as alleged. And ***nowhere*** have they pled, with any degree of particularity, that Mr. Skilling knew or should have known that such adjustments were fraudulent or otherwise improper.

Thus, having failed to identify specific facts demonstrating Mr. Skilling's personal knowledge and involvement in the unspecified "frauds" regarding these hedges, the Complaint fails to state a claim against Mr. Skilling.

(4) General Allegations Regarding Mr. Skilling's Supposed Knowledge Of Alleged Frauds Prior To His Resignation Fail To State A Claim.

Having relied on inadequate group pleading and vague and conclusory allegations with respect to Mr. Skilling personally, plaintiffs latch on to Mr. Skilling's resignation as an opportunity to summarily conclude knowledge of alleged frauds. Specifically, plaintiffs claim that Mr. Skilling's resignation was not for personal reasons, but rather was driven by his knowledge of Enron's fraudulent practices and his fear of the reckoning to follow.[87] The allegations, however, remain nothing more than a conclusion, unsupported by any well-pled facts.[88]

Plaintiffs allege that Mr. Skilling met with Lay in July and expressed his desire to

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[86] *See, e.g.*, NCC ¶ 277-278, 313, 340 (adopting Ms. Watkins' unsupported opinions regarding the Raptor hedges), 462, 477-495.

[87] NCC ¶¶ 57, 359.

[88] To the extent Plaintiffs' repeated reference to Mr. Skilling's resignation is meant to infer scienter, these allegations likewise fail. *See infra* Section II.D.2.

leave Enron because "he knew" that "the house of cards was crumbling."[89] This allegation, while colorful, nonetheless lacks any particularity, as plaintiffs have failed to identify any source (much less a reliable one) for this allegation. As best one can tell, plaintiffs have simply created this allegation to support their speculation. To the extent the alleged meeting was witnessed by someone other than Mr. Lay or Mr. Skilling, plaintiffs have failed to identify anyone. Similarly, plaintiffs fail to cite to a document or any other source. Tellingly, the Consolidated Complaint does not explain how Mr. Skilling's departure would, in any way, be consistent with a purported desire to keep a fraud hidden. Moreover, as discussed above, nowhere in the other 1,029 paragraphs of the Consolidated Complaint do plaintiffs adequately plead any facts specific to Mr. Skilling that suggest he was aware of fraudulent or improper business practices.[90]

Plaintiffs wrap these allegations in a sweeping hypothesis:

> Skilling did not resign for "personal reasons," but rather, because he knew that the scheme to defraud he had been actively participating in was falling apart and about to be exposed, which would result in Enron's stock price completely collapsing and Enron losing its investment-grade credit rating and likely going bankrupt.[91]

The conclusions stated here regarding Mr. Skilling are two-fold: (1) that "he knew" of a scheme to defraud and that (2) "he had been actively participating" in that scheme. Yet, for all the reasons set forth above, plaintiffs have failed to plead any facts generally, or specific to Mr. Skilling, upon which to base those conclusions. Indeed, these naked suppositions of knowledge

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[89] NCC ¶ 57 ("Faced with this impending catastrophe on 7/13/01, Skilling told Lay that he was going to quit because he knew that the Enron house of cards was crumbling.").

[90] *See supra.* Furthermore, allegations that "Lay, Skilling and other top Enron insiders concocted a story that Skilling's resignation would be presented as being for 'personal reasons,'" is improperly group pled in that it fails to specify facts demonstrating what exactly Mr. Lay and Mr. Skilling and the other unidentified "insiders" did.

[91] NCC ¶ 359.

and participation are exactly what the PSLRA was designed to thwart.[92] *See, e.g., Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (courts should "not accept as true conclusory allegations or unwarranted deductions of fact"); *In re Azurix Sec. Litig.*, -- F. Supp. 2d --, 2002 WL 562819, at *23 (S.D. Tex. Mar. 21, 2002) ("Because plaintiffs have put forth only conclusory allegations in support of their claims, their claims fail"); *In re BMC Software,* 183 F. Supp. 2d at 864, n. 13 ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss.").

C. THE SPECIFIC STATEMENTS PLAINTIFFS SEEK TO ATTRIBUTE TO MR. SKILLING ARE INSUFFICIENT, AS A MATTER OF LAW, TO STATE A CLAIM FOR SECURITIES FRAUD

Plaintiffs' specific allegations concerning specific statements which they attribute to Mr. Skilling fall into two general categories. The first category of allegations seeks to hold Mr. Skilling liable for Enron's public statements solely on the basis of his membership in a group. This category includes, for example, allegations against Mr. Skilling based on Enron's SEC filings or other public statements due to his status as an Enron officer or director. The second category of allegations purports to attribute specific statements directly to Mr. Skilling. As set forth herein, none of these allegations—whether taken individually or taken together—are sufficient to state a claim for securities fraud against Mr. Skilling.

1. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR SECURITIES FRAUD AGAINST MR. SKILLING DUE TO THEIR IMPROPER RELIANCE ON "GROUP PLEADING"

As set forth above, plaintiffs' complaint is replete with conclusory allegations of

[92] Other allegations that single-out Mr. Skilling are similarly unavailing. Plaintiffs' claim that Mr. Skilling was aware that certain assets held by Enron's SPEs "decreased in value by the second half of 00 ... by way of a daily 2-3 page report, which detailed positions in assets held by the Company," NCC ¶ 500 does not adequately plead facts specific to what Mr. Skilling knew, when he knew it, and with what intentions he acted. Equally insufficient is an allegation based on a post-hoc newspaper article that claimed Mr. Skilling attendance at an LJM meeting lured investors NCC ¶ 30, in that it fails to specify any facts supporting the conclusion that Mr. Skilling actively lured investors, or that he had knowledge of fraud or fraudulent intent when he attended the alleged meeting.

fraudulent conduct at Enron but is missing the particularized factual allegations required of a securities fraud pleading under Fed. R. Civ. P. R. 9(b) and under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, *et seq.* (2000) When levied against Mr. Skilling indirectly, as part of a group of persons who reviewed Enron's public statements or who participated on a conference call on which a particular statement is made, such general conclusory allegations are defective as a matter of law.

Courts have repeatedly confirmed that the "group pleading" doctrine is "at odds with the PSLRA and has not survived . . ." *In re Sec. Litig., BMC Software, Inc.,* 183 F. Supp. 2d 860, 902 n.45 (S.D. Tex. 2001) ("a more stringent pleading is required by the PSLRA"); *Lemmer v. Nu-Kote Holding, Inc.*, No. 3:98-cv-0161-L, 2001 U.S. Dist. LEXIS 13978, at *25 (N.D. Tex. Sept. 6, 2001) ("group pleading doctrine is inconsistent with the particularity requirements of PSLRA and therefore no longer is a viable means of pleading securities fraud") (citing cases); *Schiller v. Physicians Resource Group, Inc.*, No. 3:97-cv-3158-L, 2002 U.S. Dist. LEXIS 3240, at *18 (N.D. Tex. Feb. 26, 2002) (holding that plaintiffs "failed to satisfy Rule 9(b) with respect to all purported misrepresentations or omissions that rely on group pleading").[93]

Under the PSLRA and applicable case law, plaintiffs are not entitled to *presume* that Mr. Skilling was personally responsible for any of Enron's public statements, including those made in Enron's Annual Reports (*see e.g.* NCC ¶¶ 215 and 293) and press releases (*see*

[93] Before the adoption of the PSLRA, the "group pleading" doctrine permitted the presumption that the senior executives of a corporation may be held personally liable for misrepresentations or omissions contained in public statements attributed to or issued by the corporation. *Schiller*, 2002 U.S. Dist. LEXIS 3240, at *18 (citing *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 759 (N.D. Cal. 1997)). Thus, for example, Enron's SEC filings, Annual Reports, and other public statements all would have been presumed to be the collective work of those individuals with direct involvement in the everyday business of the company. *See e.g. In re BMC Software. Lit.*, 183 F. Supp. 2d at 902 (citing numerous cases, including *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 142 (S.D.N.Y. 1999) and *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 915-16 (N.D. Tex. 1998)).

e.g. NCC ¶¶ 192, 272, 316 and 343). Plaintiffs need to plead specific facts establishing a connection between Mr. Skilling and the particular alleged misstatement or omission contained in these documents. Plaintiffs must do more than assert that Mr. Skilling was an officer or director at the time such documents were prepared and disseminated to the public. *See e.g. BMC Software*, 183 F. Supp. 2d at 886 (plaintiffs must specifically plead what the individual defendant learned, when he learned it, and how plaintiffs know what he learned). At a minimum, plaintiffs must allege specific facts showing that Mr. Skilling was directly involved in the preparation and review of the allegedly false or misleading company statements at issue and that he acted with the requisite scienter.[94] *See e.g. Lemmer,* 2001 U.S. Dist. LEXIS 13978 at *24–28 (applying particularity requirements of Rule 9(b) and PSLRA to the claims against individual defendants).

Rule 9(b) and the PSLRA impose on plaintiffs the burden of coming forward with specific facts detailing the manner in which the particular misstatements alleged were false or misleading. *See* 15 U.S.C. § 78u-4(b) (1) (the "complaint shall specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading"); *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) (a complaint must "specify the statements contended to be fraudulent ... and explain why the statements were fraudulent"); *May v. Borick*, No. CV 95-8407 LGB, 1997 WL 314166, at *8 (C.D. Cal. Mar. 3, 1997) (dismissed complaint "fails to specify, for any individual statement, how and why it was fraudulent."). These requirements of Rule 9(b) and the PSLRA apply to each alleged misstatement plaintiffs attribute to Mr. Skilling. *See Harris v. IVAX Corp.*, 182 F.3d 799, 804 (11th Cir. 1999) (PSLRA's legislative history "implies piecemeal examination of the statements found in a company communication"); *Coates v. Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 645

[94] To show the requisite scienter, plaintiffs must plead facts that, if true, give rise to a strong inference that Mr. Skilling knew, or was reckless in not knowing, that the statements were false or misleading at the time they were

(N.D. Tex. 1999) ("*Coates II*") (under PSLRA, court should "compartmentalize the evidence and wipe the slate clean after considering each component"). However, after a careful inspection of the specific statements plaintiffs attribute to Mr. Skilling, identified in Exhibits A-C hereto and discussed further below, plaintiffs have failed to meet this burden. Plaintiffs' extensive reliance on "group pleading" in lieu of detailed factual allegations is thus fatal.

2. SPECIFIC STATEMENTS ATTRIBUTED TO MR. SKILLING ARE PROTECTED AS A MATTER OF LAW BY ONE OR MORE WELL-ESTABLISHED LEGAL PRINCIPLES

As discussed above, plaintiffs ignore their obligation under the Fed. R. Civ. P. Rule 8(a)(2), to provide Mr. Skilling with "a short and plain statement of the claim" against him and, instead, scatter a hodgepodge of inactionable statements throughout the complaint.[95]

Nonetheless, to vividly demonstrate the absence of even a single actionable statement by Mr. Skilling, we painstakingly sifted through the entire complaint, liberally construing plaintiffs' allegations, and identified every statement that plaintiffs seek, reasonably or not, to attribute to Mr. Skilling. Plaintiffs' sporadic efforts to attribute certain of Enron's public statements to Mr. Skilling are unfocused at best, and plaintiffs fail to explain how the alleged statements support a claim of fraud against Mr. Skilling. For the convenience of the Court, we assembled these alleged statements into the summary charts submitted as Exhibits A through C attached hereto. In addition, each of these statements is protected by one or more established legal principles or safe-harbors, as discussed below. The specific statements plaintiffs seek to attribute, directly or indirectly, to Mr. Skilling fall into the following categories:

- [12] Conference calls on which Mr. Skilling is alleged to have made statements regarding Enron's business to

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made. *See* discussion in Section II.D below.

[95] As set forth in Section I. above, plaintiffs' complaint should be dismissed on that ground alone.

securities analysts and investors (NCC ¶¶ 119, 145, 157, 179, 197, 224, 247, 263, 282, 309, 317 and 329);

- [7] Press releases and other written statements regarding Enron (¶¶ 192, 215, 271-72, 293, 316, 328, 343);
- [8] Appearances on television and radio news media and other public statements allegedly made by Mr. Skilling: CNNfn (¶¶ 264, 283, 318, 331, 332); CNBC (¶ 274); NPR (¶ 286); New Orleans (¶ 311);
- [9] News articles allegedly quoting Mr. Skilling: Bloomberg News (¶¶ 129, 178, 330 and 337); The Houston Chronicle (¶¶ 160 and 228); CFO Magazine (¶ 175); The Wall Street Journal (¶ 202); Fortune (¶ 289); and
- [5] Certain reports issued by securities analysts at CS First Boston (¶¶ 167, 191, 213) and Deutsche Bank (¶¶ 184, 232).

As discussed below, all of these statements are protected as a matter of law under one or more theories. Plaintiffs' claims regarding Mr. Skilling's alleged forward-looking statements, for example, are barred by the "safe harbor" provisions of the PSLRA. Under the "bespeaks caution" doctrine, Mr. Skilling's alleged statements to analysts and investors on conference calls also are protected by Enron's contemporaneous cautionary statements, such as those contained in Enron's SEC filings. Other statements relating to Enron's business prospects and success constitute at most inactionable puffery. Moreover, many of these alleged conference call statements merely repeat the facts as reported by Enron at the time. Because plaintiffs fail to plead any facts to show that Mr. Skilling knew those statements were false when made, none of these recitations of actual results provides a basis to claim fraud. Finally, Mr. Skilling may not be held liable for the contents of analyst reports and news articles published by independent third parties.

a. Plaintiffs' Claims Relating To Mr. Skilling's Alleged Forward-Looking Statements Are Barred By The "Safe Harbor" Provisions Of The PSLRA

Plaintiffs seek to hold Mr. Skilling liable for certain statements purportedly by him about Enron's future business prospects. 15 U.S.C. §§ 77z-2(c) (2000) & 78u-5(c). As set forth in the summary chart attached as Exhibit A hereto, each of the forward-looking statements about which plaintiffs complain is accompanied by meaningful cautionary language. (*See* NCC ¶¶ 119, 145, 179, 197, 215, 224, 247, 263, 271-72, 282, 293, 317, 329 and 337.) Thus, under the PSLRA, each of these statements is protected under the safe harbor.[96]

Under the safe harbor provisions a person is not liable with respect to any statement, whether written or oral, if and to the extent that the statement is "identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. §§ 77z-2(c)(1)(A)(i) & 78u-5(c)(1)(A)(i). Alternatively, liability does not attach if the plaintiff fails to allege and prove that the forward-looking statement "was made with actual knowledge by that person that the statement was false or misleading." 15 U.S.C. §§ 77z-2(c)(1)(B)(i) & 78u-5(c)(1)(B)(i).

Under the PSLRA, "forward-looking statements" include the following:

- "a statement of the plans and objectives of management for future operations";
- "a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the [SEC]"; and
- "any statement of the assumptions, underlying or relating to any statement described [above]."

[96] These statements are also protected under the "bespeaks caution" doctrine discussed in Section II.C.2.b below. *See* chart attached hereto as Exhibit B.

15 U.S.C. § 78u-5(i)(1). *See also Harris v. IVAX Corp.*, 998 F. Supp. 1449, 1453 (S.D. Fla. 1998) (held the statement "[w]e believe that the challenges unique to this period in our history are now behind us" to be "forward-looking statement" because it meant "good times are ahead"), *aff'd,* 182 F.3d 799 (11th Cir. 1999).

Plaintiffs' other alleged forward-looking statements fall into two general categories:

- Revenue/Earnings Projections. *See e.g.* NCC ¶ 119 ("EES would be profitable by the 4thQ 99"); ¶ 145 ("EES was on track for at least $8 billion of new contracts during 99."); ¶ 179 ("Enron remained firmly on track for a profitable 4thQ in the retail business"); ¶ 197 (Enron was forecasting strong profits for the full year 00.); ¶ 224 ("Enron was forecasting 00 and 01 EPS of $1.37 and $1.56+"); ¶ 247 ("Enron was forecasting 01 and 02 EPS of $1.40+ and $1.69+"); ¶ 263 ("A great quarter for Enron. Enron was very excited about its performance and remained comfortable with full year earnings expectations of about a $1.40") ¶ 271-2 ("'we are very comfortable with consensus analyst earnings estimates of $0.35 per share in the fourth quarter of 2000, and $1.65 for the full year 2001,' said Skilling"); ¶ 282 ("Enron was forecasting 01 EPS of $1.70-$1.80 with further growth in 02 to $2.10-$2.20"); ¶ 317 ("Enron was increasing its earnings forecasts for the year 01 to a range of $1.75 to $1.80 per share with 15+% growth in EPS in 02").

- Business Plans & Assumptions. *See e.g.* NCC ¶ 215 ("The market for bandwidth intermediation will grow from $30 billion in 2000 to $95 billion in 2004"); ¶ 293 ("At a minimum, we see our market opportunities company-wide tripling over the next five years. Enron is laser-focused on earnings per share, and we expect to continue strong earnings performance... In 2001 we expect to close approximately $30 billion in new total contract value"); ¶ 317 ("Enron expected to secure premium content directly from content owners"); *see also* NCC ¶¶ 329 and 337.

As set forth in Exhibit A hereto, each of these forward-looking statements is accompanied by cautionary language which mentions "important factors that could cause actual results to differ

materially from those in the forward-looking statement, " as contemplated by the PSLRA. *See* 15 U.S.C. § 78u-5(c)(1)(A)(i). For example, in NCC ¶ 224, plaintiffs allege that during a conference call held on April 12, 2000, forward-looking statements were made regarding earnings per share estimates for 2000 and 2001. In accordance with customary practice, conference call listeners were directed to Enron's 1Q earnings release. (*See* Exhibit D Tab 1, attached hereto, at 3 (referred to in 1Q 00 Earnings Conference Call) ("Earlier today we reported our first-quarter 2000 results. We hope you have seen the release.").) The press release, in turn, contains the following "Forward Looking Statements Disclaimer":

> This press release includes forward looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, further development of Enron's broadband services network and customer contracting activity, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements.

This detailed and informative warning is just the type of cautionary statement that the PSLRA had in mind. *See Harris v. IVAX Corp.*, 182 F.3d 799, 807 (11th Cir. 1999).

Congress recognized that forward-looking statements such as these were a valued and integral part of the public markets and that it would be unfair to encourage companies to make such statements while simultaneously threatening them with liability if their predictions were not later borne out:

> Shareholders are also damaged due to the chilling effect of the current [securities class action] system on the robustness and candor of disclosure . . . . Understanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm . . . . Fear that inaccurate projections will trigger the filing of securities class action lawsuit has muzzled corporate management . . ..

H.R. Conf. Rep. 104-369, at 42-43 (1995) (internal footnotes omitted), *reprinted in* 1995 U.S.C.C.A.N. 730, 742 (former SEC Chairman Richard Breeden's testimony before a Senate Securities Subcommittee hearing). If shareholders were permitted to bring securities class action lawsuits whenever a company's actual performance differed from projections, this would have a severe and adverse impact on the willingness of corporate managers to disclose any forward-looking information to the marketplace.

In addition, plaintiffs have not plead any facts that would indicate, as to any of the alleged forward-looking statements, that Mr. Skilling had "actual knowledge" that it was false or misleading when made. *See, e.g., In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999); *see also Allison v. Brooktree Corp.*, 1998 U.S. Dist. LEXIS 21859 (S.D.Cal. 1998).; 15 U.S.C. §§ 77z-2(c)(1)(B)(i) and 78u-5(c)(1)(B)(i). Nor have plaintiffs alleged any facts indicating that Mr. Skilling acted in bad faith in making the alleged forward-looking statements, or that these statements lacked *any* reasonable basis. On the contrary, the statements plaintiffs' allege are perfectly consistent with public companies' ordinary practice of reporting their expectations to the marketplace. In the absence of any allegations of bad faith on Mr. Skilling's part, and in the light of the cautionary language, none of the alleged forward-looking statements is actionable under the PSLRA.

b. Under The "Bespeaks Caution" Doctrine, Alleged Misstatements By Mr. Skilling Are Not Material In Light Of Contemporaneous Cautionary Language

Plaintiffs complain that Mr. Skilling participated in twelve different conference calls wherein he allegedly made statements regarding Enron's business to securities analysts and investors. (*See* NCC ¶¶ 119, 145, 179, 197, 224, 247, 263, 282, 309, 317 and 329.) As set forth in Exhibit B, all of these statements are protected under the "bespeaks caution" doctrine by virtue of the extensive relevant cautionary language contained in Enron's SEC filings and other public statements.

Under the "bespeaks caution" doctrine, "cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993), .

> [W]hen an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the 'total mix' of information the document provided investors. *Id.*

The "bespeaks caution" doctrine is an application of the broader principle that a misstatement must be material. *Rubinstein v. Collins*, 20 F.3d 160, 168 (5th Cir. 1994). A misrepresentation is not actionable unless it is material. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). To meet the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). "[M]ateriality is not judged in the abstract, but in light of the surrounding circumstances." *Rubinstein*, 20 F.3d at 167-168. The appropriate inquiry is whether, under all the circumstances, the statement or omitted fact "is one [that] a reasonable investor would consider significant in [making] the decision to invest, such

that it alters the total mix of information available about the proposed investment." *Id.* at 168, (*quoting Krim v. BancTexas Group Inc.*, 989 F.2d 1435, 1445 (5th Cir. 1993)).

Thus, the Fifth Circuit requires that alleged omissions or misleading "optimistic" statements be read *in conjunction with* relevant cautionary language in determining whether a reasonable investor would place significant weight on the alleged representation or would assess such statements in light of the disclosed risks. *Rubinstein,* 20 F.3d at 168 n.31; *see also Melder,* 27 F.3d at 1100; *Krim*, 989 F.2d at 1448-49 (cautionary language regarding substantial riskiness of investment and disclosure of approximately $140 million in problem loans made immaterial failure to classify as "potential problem loans" $50 million in loans that were 30-89 days overdue); *In re Trump Securities Litig.*, 73 F.3d at 370-77 (specific disclosures of assumptions and industry risks rendered optimistic projections and failure to disclose certain information immaterial as a matter of law); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878-79 (1st Cir. 1991) (purported omissions not material – defendants extensively disclosed riskiness of investment and specific problems facing industry); *Moorhead v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 949 F.2d 243, 245 (8th Cir. 1991) (feasibility study did not contain an actionable omission or misstatement—study contained specific cautionary language and risk statements, disclosed underlying economic assumptions).

Notably, "courts have not required cautionary language to be in the same document as the alleged misstatement or omission." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1122 (10th Cir. 1997) (holding that "cautionary statements contained in registration statement may fairly be considered as limiting the forward-looking predictions made in subsequent discussions of the same transaction"). Thus, cautionary language contained in Enron's recent SEC filings or other public statements will be read to qualify and protect any contemporaneous

statements made by Mr. Skilling, including those allegedly made on conference calls with securities analysts, as well as those allegedly made to the press on television and radio programs.

Even a cursory review of Enron's SEC filings shows that the company clearly and carefully disclosed significant risks associated with its business and plans. The statements contained in the following paragraphs are invariably accompanied by relevant cautionary language as set forth in Exhibit B. (NCC ¶¶ 119, 145, 179, 192, 197, 202, 215, 224, 228, 247, 263, 264, 271-2, 282, 283, 293, 309, 317, 318, 328, 329, 330 and 337.)

For example, plaintiffs allege in paragraph 119 that, on a conference call in October 1998, Mr. Skilling told analysts and investors that he expected "EES would be profitable by the 4thQ 99." In paragraph 145, plaintiffs allege that Mr. Skilling made similar statements regarding the strength of EES on April 13, 1999: ***"EES was on track for at least $8 billion of new contracts during 99. ...EES was on track to be earnings positive in the 4thQ 99. ..."*** (NCC ¶ 145 (emphasis in original).)

However, Enron had previously disclosed significant risks associated with its retail energy business including: ***"... the ability to penetrate new retail natural gas and electricity markets in the United States and Europe...."*** (*See* SEC J.A. Tab 2, at 40 (emphasis added).) On August 14, 1998, Enron filed with the SEC its Form 10-Q for the quarter ended June 30, 1998, reporting a smaller operating loss in EES than it had incurred in the same period during the prior year. Enron attributed these results to "costs associated with securing new contracts and developing the commodity, capital and services capability to deliver on contracts signed to date." (*See* SEC J.A. Tab 4, 15, 22.) In addition, Enron included the following cautionary language in its 1998 Annual Report on Form 10-K filed with the SEC on March 29, 1999:

> Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates....

(SEC J.A. Tab 84, at 43.)

The law presumes that a reasonable investor would assess Mr. Skilling's alleged misstatements or omissions in light of these and other public disclosures regarding the risks associated with Enron's retail energy business. Similar cautionary disclosures were made with respect to the subject matter of each statement set forth in Exhibit B hereto. Accordingly, all of these alleged statements by Mr. Skilling are protected under the "bespeaks caution" doctrine.

c. General Statements Of Optimism And Statements Expressing Positive Outlook On Enron's Business Are Not Actionable

Plaintiffs complain about certain additional alleged statements by Mr. Skilling regarding Enron's financial conditions and business. However, as is clear from the chart attached hereto as Exhibit C, what plaintiffs allege to be "misrepresentations" are in fact mere expressions of optimism regarding Enron's management, business, plans, or growth potential. Such "projections of future performance not worded as guarantees are generally not actionable under federal securities laws." *Krim*, 989 F.2d at 1446. "'Soft,' 'puffing' statements such as these generally lack materiality because the market price of a share is not inflated by vague statements predicting growth." *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993). "No reasonable investor would rely on these statements, and they are certainly not specific

enough to perpetrate a fraud on the market. Analysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen." *Id.* at 290. Courts have routinely rejected claims based on allegations similar to these. *Id.*; *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 207 (1st Cir. 1999); *San Leandro Emergency Med. Group Profit Sharing Plan v. Phillip Morris Cos.*, 75 F.3d 801, 806-08 (2d Cir. 1996); *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 53 (2d Cir. 1995). *See also Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (generalized positive statements about a company's progress are not actionable and company statements that new drug was a "fast-acting" "improved formulation" were inactionable puffing).

As the Fifth Circuit held in *Nathenson* decision: "it is well-established that generalized positive statements about a company's progress are not a basis for liability." *Id.* at 419. Similarly, in *BMC Software*, this Court held:

> Vague, loose optimistic allegations that amount to little more than corporate cheerleading are 'puffery,' projections of future performance not worded as guarantees, and are not actionable under federal securities law because no reasonable investor would consider such vague statements material and because investors and analysts are too sophisticated to rely on vague expressions of optimism rather than specific facts.

183 F. Supp. 2d at 888 (citing *Krim*, 989 F.2d at 1446). *See also Lasker v. New York Elec. & Gas. Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (observing that "broad, general statements" are "precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable."). Together with the PSLRA and SEC safe-harbor rules, plaintiffs may no longer litigate claims premised on unspecific, unquantifiable statements of optimism and projections. *See, e.g., Krim v. BancTexas Group*, 989 F.2d at 1446.

In *Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997), the plaintiffs alleged that Novell fraudulently represented that it experienced "'substantial success' in integrating the

sales forces" of the two companies, that the merger of the two companies "'was moving faster than we thought,'" and that the two companies were "'moving rapidly to a fully integrated sales force.'" 120 F.3d at 1121-22. The *Grossman* court affirmed the dismissal of the action, stating "[t]hese are the sort of soft, puffing statements, incapable of objective verification, that courts routinely dismiss as vague statements of corporate optimism." *Id. See also In re Peritus Software Servs., Inc. Sec. Litig.*, 52 F. Supp. 2d 211, 227-29 (D. Mass. 1999) (statement that the acquisition and integration of another company had been a "success" was puffery).

Similarly, in *BMC Software*, this Court dismissed securities fraud allegations that were premised on BMC's statements

> [t]hat integration of newly acquired Boole & Babbage and New Dimension was *proceeding well* and would not interfere with BMC's achieving forecasted results; *that business was performing better than expected* and that BMC enjoyed strong demand for its mainframe software; that BMC had a *stellar quarter with very strong demand* for its core products; that Defendants were comfortable with analysts' earnings expectations five weeks prior to the end of a quarter; that Defendants *had overcome problems that caused poor results in the previous quarter* and announced BMC was 'in so much better shape' with the worst behind.

183 F. Supp. 2d at 904 (emphasis added). BMC subsequently did a complete about-face, and announced adverse results for the company which sent its stock "plummet[ing]" by close to 50%. 183 F. Supp. 2d at 869, 878, 904. Nonetheless, management's general references to the company's past and current performance, and its future prospects were not actionable. *See id., In re BMC Software*, 183 F. Supp. 2d at 891-92, 904; *see also In re Peritus Software Services, Inc.*, 52 F. Supp. at 219-20 (statement that the company was experiencing "'unprecedented market demand'" for its products was "mere corporate puffery").

As set forth in the charts attached as Exhibit C hereto, plaintiffs' claims based on Mr. Skilling's alleged positive statements to news media and other members of the public simply

are not actionable. (*See e.g.* NCC ¶¶ 129, 170, 175, 178, 202, 228, 264, 274, 283, 286, 289, 311, 318, 330, 331, 332 and 337.)

d. Alleged Statements By Mr. Skilling Culled From Analysts Reports And News Articles Do Not Support A Claim Of Fraud

In addition to certain Enron press releases and statements made during conference calls with securities analysts, plaintiffs apparently seek to hold Mr. Skilling liable for reports issued by *third party* securities analysts and quotes from news periodicals such as *The Houston Chronicle* and *The Wall Street Journal*. However, in the absence of any factual allegations establishing that Mr. Skilling exercised control over the contents of these reports and news articles, or otherwise controlled these authors, such a theory of liability has no teeth and fails under settled law.

Plaintiffs cite statements by analysts contained in five particular analyst reports and attempt to attribute those statements to Mr. Skilling. Plaintiffs also complain about statements contained in news articles published in *The Houston Chronicle*, *Fortune*, *CFO Magazine*, *Bloomberg News* and *The Wall Street Journal*. On their face, these reports and articles purport to present information allegedly obtained from Mr. Skilling. (*See, e.g.*, NCC ¶¶ 167, 184, 191, 213 and 232 (analyst reports characterizing information purportedly from Mr. Skilling) and NCC ¶¶ 129, 160, 175, 178, 202, 228, 289, 330, and 337 (news articles referring to Mr. Skilling).) However, plaintiffs do not plead any facts to explain how Mr. Skilling could be held liable for those statements.

For example, in NCC paragraph 202, plaintiffs allege that on January 1, 2000, *The Wall Street Journal* reported that Mr. Skilling expects profit from retail energy services to rise "significantly" from a projected $50 million for 2000. In paragraph 289, plaintiffs allege that *Fortune* published an article questioning the quality of Enron reported earnings. The article

purports to quote Mr. Skilling as stating that Enron's wholesale business is "very simple to model" and the article suggests that Mr. Skilling also stated that "the growth in Enron's profitability tracks the growth in its volumes almost perfectly." These statements may or may not be accurate characterizations of Mr. Skilling's then-stated views.

Federal securities laws, however, "do not require the [defendant] company to police statements made by third parties for inaccuracies, even if the third party attributes the statement" to that defendant. *See Raab v. General Physics Corp.*, 4 F.3d 286, 288-9 (4th Cir. 1993). The same holds true for company executives:

> "Under Section 10(b) and Rule 10b-5, a defendant may not be held liable for statements by a third party securities analyst unless the defendant placed its imprimatur, express or implied, on the analyst's statements. At minimum, the plaintiff must show (1) that a corporate insider provided misleading information to a third-party analyst (2) who, relying on this information, prepared a report (3) that the insider endorsed or approved. The plaintiff must also plead these facts with the specificity required by Rule 9(b)."

Demarco v. DepoTech Corp., 149 F. Supp. 2d 1212, 1231 (S.D. Cal. 2001) (citations omitted). *See also SEC v. Wellshire Securities, Inc.*, 773 F.Supp. 569 (S.D.N.Y. 1991); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969).

In *DeMarco*, the Court dismissed as "meritless" plaintiffs' contention that defendants were responsible for statements made by third party securities analysts in part because plaintiffs failed to allege that defendants "had any involvement in the preparation of the analysts' opinions." *Id. See also In re Stratosphere Corp. Sec. Litig.*, 66 F. Supp. 2d 1182, 1199-1200 (D. Nev. 1999) (holding that defendants are liable only for analysts' reports they "adopt" by entangling themselves with the report through endorsement or approval thereof); *In re Health Management Sys., Inc. Sec. Litig.*, No. 97 CIV 1865 (HB), 1998 WL 283286, at *5 n.2 (S.D.N.Y. June 1, 1998) ("To adequately plead 'entanglement' plaintiffs must specify what

information was supplied to the analyst, who supplied it, and how defendants may have controlled the contents of the report."); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980).

To adequately allege that Mr. Skilling was responsible for these third party comments, at the very least plaintiffs would have to plead facts showing that he approved or exercised control over those comments. Plaintiffs do not plead any facts showing that Mr. Skilling exercised control over any of these analysts during the conversations that presumably led to the publication of the alleged reports. *See Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1249 (N.D. Cal. 1998) ("Since the allegation of entanglement is central to the overall allegation of securities fraud, it must be plead with the degree of specificity required under Rule 9(b). The pleading should (1) identify the specific forecasts and name the insider who adopted them; (2) point to specific interactions between the insider and the analyst which allegedly gave rise to the entanglement; and (3) state the dates on which the acts which allegedly gave rise to the entanglement occurred.") (citations omitted). Here, plaintiffs plead no facts showing the exertion of any such control and, without such allegations, the plaintiffs may not attribute these statements to Mr. Skilling.

Securities analysts draw upon information from numerous sources for their reports, and the reports themselves contain a mix of facts and opinions. The conclusions reached by analysts about Enron's prospects are not Enron's statements, much less Mr. Skilling's. Accordingly, courts refuse to attribute analyst statements to defendants even where the analyst report itself states that it is based in part on contact with defendants. *Fitzer v. Security Dynamics Techs., Inc.*, No. Civ. A 98-12496-WGY, 2000 WL 1477204, (CCH) ¶ 91,224 (D. Mass. Sept. 28, 2000) (finding inactionable statements by analysts who claimed to have "visited" with

defendants, when allegations of entanglement were nothing more than general charges that defendants regularly met and provided guidance to analysts).

Where analyst reports do not purport to quote a particular individual defendant, courts have rejected plaintiffs' attempts to hold such defendant liable therefor. *See, e.g., Thornton v. Micrografx, Inc.*, 878 F. Supp. 931, 935 & n.3 (N.D. Tex. 1995). Here, the alleged analyst reports do not purport to quote Mr. Skilling; rather, they purport to characterize the analyst's opinion of what they believe Mr. Skilling said at a recent meeting or conference call. Nor do the analyst reports provide any details concerning any specific statements Mr. Skilling actually made. Consequently, the statements contained in analyst reports may not be attributed to Mr. Skilling at all and, accordingly, such reports may not form any basis for a securities fraud claim against him.

e. Plaintiffs May Not Plead "Fraud By Hindsight" Due To Restatement As To Mr. Skilling's Accurate Recitation Of Enron's Reported Results

Plaintiffs complain that Mr. Skilling misreported Enron's net income and earnings per share figures during certain conference calls and meetings with analysts that took place on July 13–16, 1999. For example, Mr. Skilling is alleged to have stated the following:

> EPS in the 2ndQ increased 29% to $.27 per share compared to $.21 in the 2ndQ of last year. Net income in the 2ndQ increased 53% to $222 ***million up from $145 million last year.*** (NCC ¶ 157) (Emphasis in original).

However, these exact net income figures were publicly announced in Enron's quarterly report on Form 10-Q for the three months ended June 30, 1999. Thus, the statements attributed to Mr. Skilling merely constitute a recitation of actual results as reported by the company. Nowhere in the entire voluminous Complaint do plaintiffs allege facts indicating that Mr. Skilling had any reason to question the numbers blessed by Enron's internal accountants and

financial personnel, which the company then provided to the public. This is perhaps plaintiffs' single biggest failure.

Plaintiffs allege that Mr. Skilling relayed to the public Enron's reported results, but do not indicate what is false or misleading about such statements. Plaintiffs seem to rely generally on the fact that certain of these numbers were subsequently restated, assuming without argument that Mr. Skilling is *ipso facto* guilty of fraud. It is not enough merely to allege, as plaintiffs have done here, that these numbers were restated at a later date. Attempting to plead "fraud by hindsight" is not permitted under settled law. *See Fine v. American Solar King Corp.*, 919 F.2d 290, 297 (5th Cir. 1990) (party must know that it is publishing materially false information, or must be severely reckless in publishing such information); *Lovelace*, 78 F.3d at 1020; *Melder v. Morris*, 27 F.3d 1097, 1101 n.8 (5th Cir. 1994). Instead, plaintiffs must allege facts existing *at that time* which would establish that Mr. Skilling knew, or was reckless in not knowing, that these net income numbers would later be restated. What the plaintiffs ignore, however, is at the time Mr. Skilling allegedly reported these net income figures, they were the very numbers blessed by Enron's accountants and disseminated to the public by the company.

The fact that Mr. Skilling's statements may have been affected by Enron's later decision to restate its financial statements does not make his statements retroactively false or misleading at the time they were made. As discussed in Section II.A above, the subsequent November 2001 restatement relates to an isolated number of items, primarily due simply to eliminating certain reported items in consolidation, one of which was the result of an admitted error on the part of Enron's outside auditor, Arthur Andersen. Thus, the particular facts underlying the restatement are as consistent with innocent accounting errors as they are with fraudulent conduct. Moreover, plaintiffs' allegations regarding the restatement fail to show any

fraud on the part of Mr. Skilling. It is plain to see that Mr. Skilling was engaging in a straight-forward recitation of reported financial results and, in some cases, actual business developments. (*See* NCC ¶¶ 119, 129, 145, 167, 178, 192, 202, 215, 224, 247, 263, 282, 283, 289, 293, 309, 317, 328, 329, 331, 337 and 343.) Thus, none of these statements are actionable.

D. PLAINTIFFS HAVE FAILED TO ADEQUATELY ALLEGE FACTS SUFFICIENT TO SUPPORT A STRONG INFERENCE OF SCIENTER WITH RESPECT TO MR. SKILLING

As set forth in detail above, in order for a plaintiff to adequately plead a claim for fraud under Exchange Act Section 10(b) and Rule 10b-5, the plaintiff must demonstrate that the defendant is allegedly responsible for some material misstatement or an omission made with scienter. *See, e.g., Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067-68 (5th Cir. 1994); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520-21 (5th Cir. 1993). Not every misstatement or omission in a corporation's disclosures is actionable under the securities laws, even if material, because only those statements or omissions made with scienter are actionable. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Consequently, "scienter, 'a mental state embracing intent to deceive, manipulate, or defraud,' is essential to the claim and must be adequately "pleaded to survive a motion to dismiss." *Tuchman*, 14 F.3d at 1067.

The PSLRA requires that to adequately plead the element of scienter:

> [T]he complaint, shall, with respect to each act or omission alleged to violate this chapter, ***state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.***

15 U.S.C. § 78u-4(b)(2) (emphasis added).

Fifth Circuit law presently holds that the "required state of mind" necessary to

establish that a defendant acted with the requisite scienter is "severe recklessness."[97] *See Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 409 (5th Cir. 2001) (citing *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 961-62 (5th Cir. 1981) (*en banc*); *see also Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 n. 12 (5th Cir. 1996). A plaintiff only alleges facts sufficient to support a strong inference that a defendant acted with "severe recklessness" on a showing of "highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is ***either known to the defendant or is so obvious that the defendant must have been aware of it.***" *Tuchman*, 14 F.3d at 1067 (emphasis added (quoting *Shushang*, 992 F.2d at 521); *see also In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 868 n.18 (S.D. Tex. 2001) (Harmon, J.) (quoting same). Such a showing may only be met based on facts stated with particularity. *See Nathenson*, 267 F.3d at 411 (citing *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 198-201 (1st Cir. 1999)); *Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994) ("The plaintiffs must set forth *specific facts* supporting an inference of fraud." (emphasis in original)) .

Historically, plaintiffs often have tried to plead facts sufficient to create a strong inference of scienter by alleging: (1) facts that demonstrated the defendant had both motive and opportunity to commit fraud; or (2) alleging facts sufficient to constitute strong circumstantial evidence of conscious misbehavior or recklessness. *See Nathenson*, 267 F.2d 409 (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). The legislative history of the PSLRA[98] and recent authority, however, make clear that "motive and opportunity" pleading is no

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[97] Mr. Skilling expressly reserves the right to argue that a more appropriate standard is something more than "severe recklessness, such as "deliberate recklessness" or "conscious misconduct." *See, e.g., In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 977, 986 (9th Cir. 1999)).

[98] 141 Cong. Rec. S19,034 (Dec. 21, 1995).

longer sufficient in the Fifth Circuit. *See Nathenson*, 267 F.2d at 410-11. Instead, the Fifth Circuit recently held that while "[a]ppropriate allegations of motive and opportunity may meaningfully enhance the strength of the inference of scienter, ... it would seem to be a rare set of circumstances indeed where those allegations alone are both sufficiently persuasive to give rise to a scienter inference." *Id.* at 412.

In this case, "motive and opportunity" are all that the plaintiffs allege against Mr. Skilling. As set forth in detail below, the only facts that plaintiffs allege with respect to Mr. Skilling, personally, are that: (1) he was an Officer and Director of Enron who served on the Management and Executive Committees; (2) he resigned from Enron in August 2001; and (3) during the class period, Mr. Skilling exercised some portion of stock options that had vested and sold some Enron stock. These allegations are simply insufficient to create a strong inference of scienter. We deal with each of these allegations in reverse order.

1. MR. SKILLING'S PATTERN OF TRADING ACTIVITY IS NOT "UNUSUAL" SO AS TO CREATE STRONG INFERENCE OF SCIENTER

Conclusory allegations of insider trading are insufficient to give rise to a strong inference of scienter. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860 (S.D. Tex. 2001). Rather, to support a strong inference of scienter "[p]laintiffs must delineate unusual trading at suspicious times and in suspicious amounts by corporate insiders, out of line with prior trading practices, for such conduct to be probative of scienter." *Id.* at 901 (citing *Rubinstein v. Collins*, 20 F.3d 160, 169-70 (5th Cir. 1994); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1224 (1st Cir. 1996); *Greebel v. FTP Software*, 194 F.3d 185, 206-7 (1st Cir. 1999); and *In re Silicon Graphics, Inc. Sec. Lit.*, 183 F.3d 970, 985-86 (9th Cir. 1999)). In determining whether an individual's pattern of trading is unusual enough to permit an inference of scienter courts have considered a variety of factors, including: (1) the amount of stock sold by the defendant in light

of the time period involved; (2) the percentage of the insider's stock sold; (3) the number of insiders who sold stock; (4) the amount of money made from the sale of stock; (5) whether the sales were pursuant to a Rule 10b-5(1) plan; (6) reasons for the sales; and (7) timing of the sales. *See* cases cited *supra*.

As demonstrated in detail below, when Mr. Skilling's trading pattern is considered in light of these foregoing factors, it becomes clear that an inference of scienter is completely inappropriate. There was nothing unusual or strange about Mr. Skilling's trading pattern. Quite the contrary, one-third of Mr. Skilling's total sales before he left Enron were pursuant to a 10b5-1 plan[99] that he put into place in November of 2000 and which he terminated in June of 2001 because Enron's stock price had fallen too low. (*See* NCC ¶ 405(b) (showing Mr. Skilling's regular 10,000/week sales ended on 6/13/01).)[100] Mr. Skilling did not sell an unusually large portion of his Enron holdings. (*See* Figure 1, *infra*, at p. 66). And Mr. Skilling did not sell Enron stock at unusual times. Indeed, his largest volumes of sales occurred contemporaneous to the annual vesting of large portions of his options. *Id.* On its face, Mr. Skilling's trading pattern is simply not the kind of unusual trading that is sufficient to support a strong inference of scienter.

a. Plaintiffs' Reliance On The Hakala Declaration Is Inappropriate And Ineffective

Plaintiffs attempt to establish that Mr. Skilling's trading patterns were unusual by relying exclusively on the allegedly expert opinion of Scott Hakala. (NCC ¶¶ 406-417.) Hakala

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[99] Rule 10b5-1 of the Securities Exchange Act of 1934 provides an affirmative defense against insider trading liability for a transaction done pursuant to "blind trusts" (trusts in which investment control has been delegated to a third party, such as an institutional or professional trustee) or pursuant to a written plan, or a binding contract or instruction, entered into in good faith at a time when the insider was not aware of material nonpublic information, even though the transaction in question may occur at a time when the person is aware of material nonpublic information.

[100] *See* Rule 10b5-1 (indicting that sales made pursuant to a predetermined plan may only case upon express termination of the plan by the seller).

opines that Mr. Skilling's trading patterns "were consistent with foreknowledge that the share price of Enron was inflated," (Hakala Decl. ¶ 38).

However, it is well-settled that to adequately allege scienter "'a plaintiff must plead ***specific facts, not mere conclusory allegations***." *Tuchman*, 14 F.3d at 1067 (emphasis added) (quoting *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The Hakala Declaration upon which plaintiffs' scienter allegations rest is not fact. It is nothing more than the untested view of someone claiming to be an expert in the area covered by the opinions.[101] At least one federal court has rejected a virtually identical attempt to plead scienter by expert opinion. *See Demarco v. Depotech Corp.*, 149 F. Supp. 2d 1212, 1220-22 (S.D. Ca. 2001).

In *Demarco*, the court explained that consideration of an expert's affidavit would compel the court to confront a myriad of complex evidentiary and procedural issues not susceptible to resolution at the pleading stage. *Id.* at 1221. For example, a thorough evaluation of the proffered testimony would require a deposition of the expert and a subsequent *Daubert* hearing to determine the admissibility of opinions. "These additional proceedings would be improper at the pleading stage of any civil case, and would likely run afoul of the discovery stay imposed by the Reform Act."[102] *Id.*

Even assuming that the procedural and evidentiary hurdles could be cleared, the

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[101] The question of whether the Hakala declaration is even expert opinion remains open. Defendants have not been given any opportunity to investigate or challenge Hakala's expertise. Moreover, we believe that it is inappropriate, at any point in the litigation, for this Court to consider as "expert" an "opinion" about how a particular defendant might act in handling stock he owns under various circumstances. It is unclear what is the area of expertise being proffered by Hakala. The purported "opinion" in this area is more akin to a psychological inquiry or an attempt at clairvoyance, rather than anything to do with securities law or economics. Consequently, the "opinions" Hakala provides cannot be considered those of an "expert."

[102] The court also held that an expert's affidavit is not a "written instrument" pursuant to Fed. R. Civ. P. 10(c), which provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *Demarco*, 149 F. Supp. 2d at 1220. A "written instrument" under Rule 10(c) is "a document evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement." *Id.* (quotations and citations omitted). An expert's affidavit does not resemble any of these classes of documents. *Id.*

Demarco court questioned the fundamental usefulness of an expert's affidavit in connection with judging the adequacy of a securities fraud complaint. *Id.* at 1221-22. The inclusion of an expert's affidavit does not relieve the plaintiffs of their burden to comply with the Reform Act and Fed. R. Civ. P. 9(b), both of which require plaintiffs to support their legal claims with *factual* specificity. *Id.* "Conclusory allegations and speculation carry no additional weight merely because a plaintiff placed them within the affidavit of a retained expert." *Id.* at 1222.

To the extent that this Court decides to consider the Hakala Declaration (which we do not believe is appropriate),[103] it does not support an inference of scienter. The analysis set forth in the Hakala Declaration is admittedly inexact and woefully incomplete. The views set forth in the Hakala Declaration are based upon an analysis of the timing of Enron defendants' exercise of stock options and sale of Enron stock, and ignore fundamental economic and tax aspects of such exercise. (*See* Hakala Decl. ¶ 17.) Hakala purports to analyze each Enron defendant's amount of shares sold, exercise of stock options and timing of those events prior to, during, and following the class period in order to determine whether particular defendants prematurely exercised options, or engaged in other "economically inconsistent" trading activity. (*See id.*) Hakala opines that because an executive "sacrifice[s] excess value" every time options are exercised prematurely, such behavior is only rational if the executive expects the price of the stock to decrease in the future. (*See id.*) Thus, Hakala concludes, the repeated premature exercise of options by Enron Defendants allegedly demonstrates knowledge that the price of Enron's stock was overvalued. (*See id.*)

However, by Hakala's own admission his analysis is overly simplistic and is contradicted by common experience:

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[103] To that end, Defendant Jeffrey K. Skilling hereby joins in Defendant Kenneth L. Lay's Motion To Strike The Hakala Declaration, and incorporates by reference all the arguments set forth therein.

> A complication in applying the broad insider trading literature to specific companies and circumstances is the general finding that ***insiders will naturally tend to sell their company's shares over time for wealth diversification and liquidity purposes....***
>
> [In particular], ***executives with significant components of their wealth tied to a specific company's returns are generally willing to exercise stock options prematurely*** and will sell shares for personal wealth diversification purposes.

(Hakala Decl. ¶¶ 12-13) (Emphasis supplied). This stark admission provides a compelling explanation for why Mr. Skilling's trades are not at all probative of the scienter alleged, and in fact may show the opposite.

Hakala's analysis also completely ignores the fact that Enron stock paid dividends[104] and the substantial tax incentives that affect an individual's decisions regarding the exercise of compensatory stock options. The Internal Revenue Code requires the individual to pay income tax on the "spread" between the fair market value of the stock on the date of exercise and the strike price of the option any time an individual exercises stock options.[105] 26 U.S.C. § 1011(a) (2000). The difference between the two amounts is taxed at the ordinary income tax rate, corresponding to the executive's tax bracket, which was over 39% for federal

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[104] Hakala asserts that exercising options before maturity "sacrifices excess value" and is an uneconomical decision. Hakala is evidently relying in part on option valuation theory which tells us that, in the absence of dividends, the value of a call option increases with time to maturity. According to option valuation theory, when a stock does not pay dividends, a call option is worth more alive than dead because by not exercising early, an investor can keep his option open and earn interest on the exercise price money. If, however, the underlying stock pays a dividend, the valuation theory discussed above does not apply. When the underlying stock pays a dividend, a detailed analysis must be performed to determine whether, from an economic basis, the option should be exercised early. The analysis that is required would compare the expected interest on the exercise money if the option is kept open with the dividend the investor would capture by exercising the option early, before the ex-dividend date. This analysis is not rudimentary and in fact cannot be accomplished using a simple formula. Rather, "[t]he only general method for valuing a[] ... call option on a dividend paying stock is to use a step-by-step binomial method." Stewart C. Myers and Richard A. Brealey, Principles of Corporate Finance (4th Ed. 1991, McGraw-Hill). Because Hakala has not endeavored to correctly analyze these options on Enron stock, which paid cash dividends, his assessment that it was uneconomical to exercise options early is incomplete.

[105] This summary of the applicable tax rules assumes that the stock options at issue are "nonqualified" stock options, were the only form of option that Mr. Skilling ever received. There would be some differences in treatment if the options were "incentive stock options. 26 U.S.C. § 422. However, these differences are irrelevant for present purposes.

purposes during the relevant period.[106] However, once the individual has exercised the options and actually owns the securities, any difference between the market price on the date of exercise and the gain recognized from the ultimate sale of the securities is taxed as capital gains, rather than ordinary income. Assuming the individual holds the securities for more than one year, the tax rate on the appreciation will be 20%, i.e., roughly half the ordinary income rate. 26 U.S.C. § 1(h).[107] The disparity in the tax rates applied to these two outcomes indicates that if a holder of vested options believes the price of the underlying stock will continue to rise in the future, the economically rational course in light of the applicable tax rules, in fact, would be to exercise the options as soon as they vest and then hold the actual securities until ready to sell. This sequence would result in more of the gain from the increased value of the stock being taxed as long-term capital gains, rather than ordinary income.

Despite these fatal flaws in his analysis, Hakala nevertheless attempts to opine on what inferences may be drawn from Mr. Skilling's trading in Enron. Hakala reaches these conclusions without any information concerning Mr. Skilling's financial condition—e.g. the very diversification or liquidity issues that Hakala acknowledges can drive an executive to exercise options earlier rather than later—or tax status. Hakala's analysis also ignores:

- The amount of vested but unexercised options held by Mr. Skilling;
- The amount of unexercised and unvested options that Mr. Skilling held;[108]
- Expectations of future grants or options awards;[109]

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[106] For the vast majority, if not all of the Enron Defendants, the applicable maximum ordinary income tax rate would have been 39.6% for years 1997-2000, and 39.1% for 2001. 26 U.S.C. § 1.

[107] If the individual does not hold the securities for more than a year after exercising the options, the post-exercise gain would be a short term capital gain and be taxed at the same rates as ordinary income. *See* 26 U.S.C. §§ 1(h), 1222(1).

[108] This omission is quite substantial in the case of Mr. Skilling who as of December 31, 2000 held 1,347,000 unvested options let alone vested unexercised options. (*See* SEC J.A. Tab 22, at 25.) Mr. Skilling's more than 1.3 million unvested options were equal to his entire Enron holdings at that same period. *See* Fig. 1 *infra*.

- Personal issues that affect an individual's trading decisions;
- Distinctions between trading pursuant to a 10b5-1 plan and other sales.[110]

Any or all of these factors can greatly affect an individual's trading decisions. Yet, Hakala's analysis fails to consider any of them, even while admitting their significance. When all of these factors are taken into consideration, it becomes clear that Mr. Skilling's trading pattern was not unusual at all. Consequently, any consideration of Mr. Skilling's sales that does not take into account vested unexercised options, expectations of future grant or option awards or personal issues that affect trading is necessarily and fatally flawed.

b. Mr. Skilling's Trades Of Enron Stock Were Not Unusual

Even if we accept as accurate for purposes of this motion the number of shares allegedly sold by Mr. Skilling, the timing of those sales, and the proceeds obtained therefrom as set forth in Hakala's Declaration,[111] there is simply nothing unusual about Mr. Skilling's trades or trading history. Rather, Mr. Skilling's trading pattern simply evidences a rational desire to: (1) liquidate some of his Enron holdings; (2) diversify his personal holdings; and (3) maintain a substantial position in Enron's securities. (*See* Fig. 1 below.)[112]

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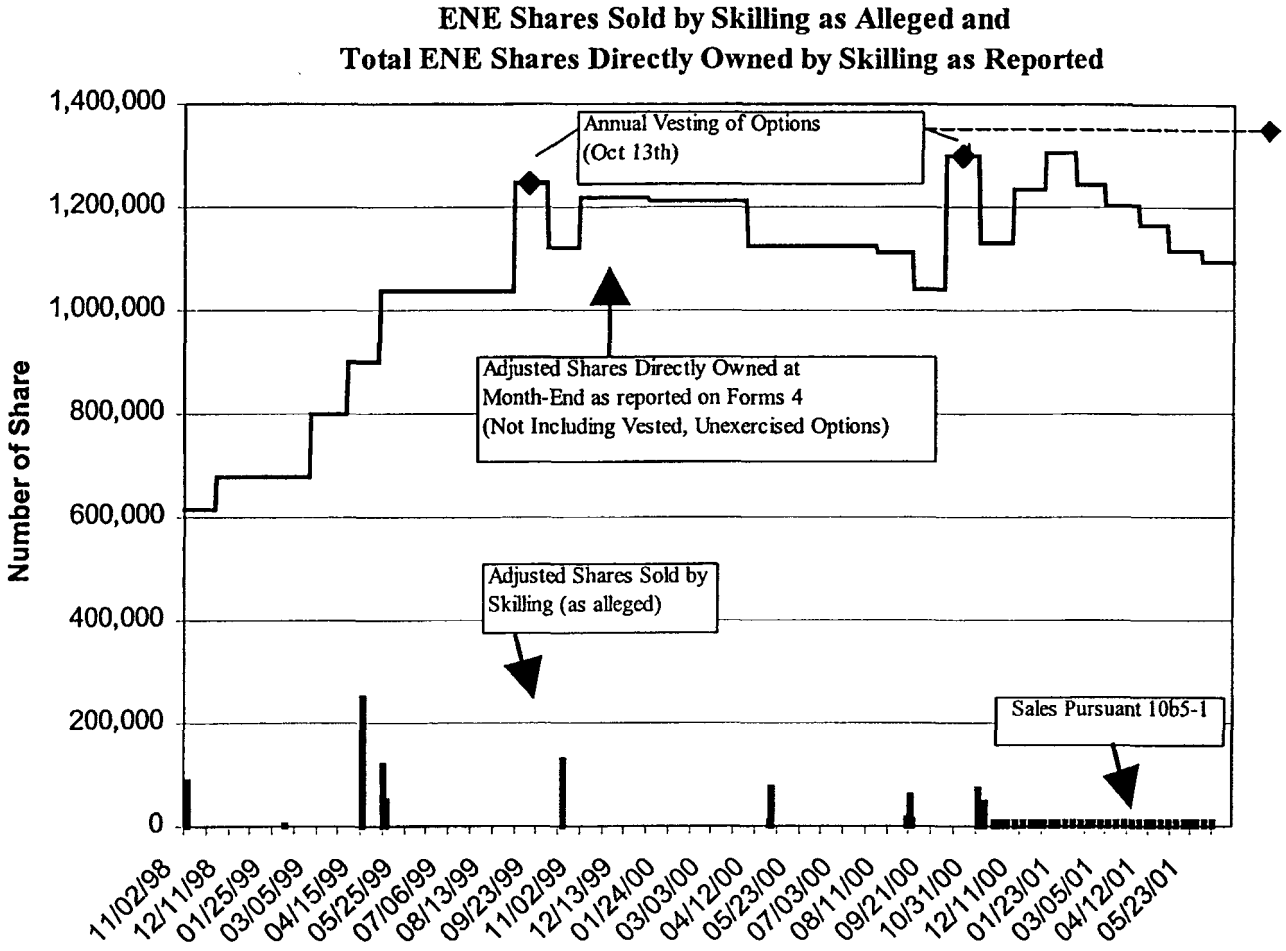
[109] Indeed, in 2001, at the same time that sales were being made pursuant to Mr. Skilling's 10b5-1 plan, Mr. Skilling was scheduled to have another 200,000 shares worth of options vest.

[110] It is important to note that the Consolidated Complaint seeks to summarily dismiss of any distinction between individualized sales and those made pursuant to a 10b5-1 plan (NCC ¶ 405) by simply alleging that the "at the time that the Rule 10b5-1 selling program was adopted by those Enron Defendants ... those individuals were already in the midst of pursuing the fraudulent scheme and course of business that operated as a fraud ... and knew that the price of Enron common stock was artificially inflated by the false and misleading statements and concealments those participating in the scheme had made. Thus, the plans were not entered into in good faith, but rather, were part of a scheme to evade the prohibition against insider trading contained in the [Exchange] Act."

[111] Mr. Skilling accepts these facts only for purposes of this motion, and obviously disputes any inferences or conclusions that Hakala attempts to draw from these facts.

[112] Figure 1 is a graphic depiction of the number of shares of Enron sold by Mr. Skilling in each of his trades as compared with his total holdings of Enron stock. The numbers that provide the basis for this chart have been taken from the Hakala Declaration, and supplemented with other data from Enron's proxy statements and Mr. Skilling's Form 4 filings that were omitted from the Hakala Declaration. The Form 4 filings upon which Figure 1 relies are attached hereto as App. E.

FIGURE 1



As Figure 1 makes clear, from July 1999 through his departure from Enron Mr. Skilling's net long position in Enron stock remained relatively stable, and never fell below one million shares after achieving that level in 1999. (*See id.*) In January 1997, Mr. Skilling became President and Chief Operating Officer ("COO") of Enron. A large part of Mr. Skilling's compensation as President and COO was provided to him in the form on non-qualified options. *See* (1997 Proxy). This remained the case from 1997 until 2001. In 1998 and 1999, large portions of Mr. Skilling's nonqualified options began vesting. As this occurred, Mr. Skilling began to exercise those options and sell ***some*** of the stock. (*See* Fig. 1.)

By the middle of 1999, Mr. Skilling held more than 1,000,000 shares in Enron, ***excluding***: (1) vested unexercised options; (2) unvested options; and (3) future stock grants and option awards.[113] (*See id.*) From that time until he left Enron, Mr. Skilling maintained a consistent net long position in actual shares of Enron stock of over one million shares once his holdings reached that level in the middle of 1999. (*See id.*) Mr. Skilling's selling pattern from 1999 to 2001 shows that he was exercising options and selling shares at about the same rate that he was acquiring new shares and new options were vesting. (*See id.*) As Figure 1 shows on October 13 of each year, a substantial number of Mr. Skilling's options vested. After these options vested, Mr. Skilling would regularly exercise and sell some portion of these options. Such a regular pattern is not the sort of unusual trading that permits an inference as a matter of law. *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001) ("A corporate insider may sell stock to fund major family expenses, diversify his portfolio, or arrange his estate plan. He may sell stock in a pattern that has nothing to do with any inside information, such as selling stock twice a year when the college tuition for his children is due."); *Schneider v. Vennard* (In re Apple Computer Sec. Litig.), 886 F.2d 1109, 1117 (9th Cir.1989) (holding that when sales are "consistent in timing and amount with a past pattern of sales" there can be no inference of scienter); *Freeman v. Decio,* 584 F.2d 186, 197 n.44 (7th Cir.1978) (inference that defendants were acting in bad faith "can be nullified by a showing that sales in question were consistent in timing and amount with a past pattern of sales or that other circumstances might reasonably account for their occurrence") (affirming grant of summary judgment on issue of scienter). There is nothing unusual about such a trading pattern. Indeed, Mr. Skilling held his largest stake in Enron, approximately 1.3 million shares, in February and March of 2001, just seven months

[113] Neither the Hakala Declaration nor the Complaint allege that their numbers include any of the foregoing categories. Consequently, we believe they are not included in their numbers.

before the end of the class period. Allowing one's position to increase through the purported class period is hardly consistent with knowledge of a fraud occurring at the company.

In fact, there is nothing about Mr. Skilling's trading pattern from which one could infer that Mr. Skilling thought Enron's stock was overvalued. Quite the contrary, Mr. Skilling ceased selling his Enron stock altogether in June 2001 when the stock dropped below $50. (Hakala Decl. Exh. C.) This is evidence that Mr. Skilling believed Enron stock to be worth more than $50 a share, not less. If Mr. Skilling truly believed, as Hakala contends, that Enron's stock was overvalued and Mr. Skilling's sales are evidence of scienter, one would not expect Mr. Skilling to cease his predetermined sales plan.

(1) A Large Portion Of Mr. Skilling's Sales Were Made Pursuant To A 10b5-1 Plan

In fact, plaintiffs ignore altogether the fact that large portions of Mr. Skilling's sales were made pursuant to a 10b5-1 plan. (*See* NCC ¶ 405). In November, 2000, Mr. Skilling entered into a plan pursuant to SEC Rule 10b5-1, which required his broker to sell 10,000 shares of Enron every week and took all discretion regarding such sales out of his control. (*See* Hakala Decl. Exh. C.) Mr. Skilling left this plan in place until the middle of June 2001, when Enron's stock price fell below $50 a share. (*See* Hakala Decl. Exh. C (showing an end to Skilling's sales on June 13, 2001); NCC ¶ 74 Enron Timeline (charting Enron's stock price).)[114] During the time this predetermined plan was in place, 320,000 shares of Enron stock were sold for Mr. Skilling's account. (*See* Hakala Decl. Exh. C.) That total represents ***24 percent*** of the total sales identified by Hakala. (*See id.*) These sales—that were made pursuant to a 10b5-1 plan—cannot provide a basis for a strong inference of scienter. *See, e.g., In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407 (9th Cir. 1994) (finding no scienter where sales were made pursuant to

predetermined plan in accordance with SEC Rule 144). Indeed, under Hakala's and the plaintiffs' theory, one would expect to see a much larger volume of sales taking place under the protection of a Rule 10b5-1 plan.[115]

(2) Mr. Skilling *Did* Not Sell An Unusually Large Portion Of His Enron Holdings

Even when viewed in the aggregate, Mr. Skilling's sales of Enron securities were not such a substantial proportion of his holdings that an inference of scienter is appropriate. The Consolidated Complaint asserts that Mr. Skilling sold 42% of his holdings in Enron. (NCC ¶ 83(b)). This is simply wrong. Not surprisingly, plaintiffs do not provide the aggregate number of shares allegedly held by Mr. Skilling from which they derive their 42% number. (*See id.*) It is wholly unclear how plaintiffs even arrived at this 42% figure. In light of the fact that plaintiffs' scienter pleadings against Mr. Skilling are entirely premised on his alleged insider trading, this failure to adequately plead specific facts is glaring. It appears that plaintiffs have selectively plucked certain facts out of Enron's proxy statements and ignored others in order to distort the true nature of Mr. Skilling's trading history. For instance, plaintiffs' analysis seems to ignore the number of vested but unexercised options that Mr. Skilling held in order to make his sales seem like a much larger portion of his total holdings. Mr. Skilling's vested options are an integral part of any calculus since he could have exercised and sold them at any point. *See, e.g.*, *In re Silicon Graphics, Inc. Sec. Litig*, 183 F.3d 970, 986-87 (9th Cir. 1999) ("we see no reason to distinguish vested options from shares because vested options can be converted easily to

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[114] *See* Rule 10b5-1 (indicating that sales made pursuant to a predetermined plan may only cease upon express termination of the plan by the seller.

[115] Even if plaintiffs' conclusory, unsupported allegations that Mr. Skilling was aware of material negative information about Enron prior to the time he entered into the Rule 10b5-1 plan were adequately alleged, that would not overcome the fact that the use of a 10b5-1 plan may negate any inference of scienter. To hold otherwise would allow circular reasoning to support the strong inference of scienter that a plaintiff must plead with specific facts. In other words, plaintiffs cannot take advantage of conclusory allegations as to the unavailability of a 10b5-1 plan, to

shares and sold immediately.").[116] Plaintiffs also appear to have excluded Mr. Skilling's unvested options—which were significant.[117] According to Enron's 2000 Proxy Statement, Mr. Skilling held 1,347,000 options that were "unexercisable."[118] When Mr. Skilling's unvested and unexercised options are added to the equation, the actual proportion of his Enron holdings that Mr. Skilling sold was far less than 42%.

However, even if Mr. Skilling had sold 42% of his Enron stock, that would not necessarily be sufficient to support an inference of scienter. *In re The Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1094-96 (9th Cir. 2002) (holding that sales by an executive of 48% were not unusual where there was no "meaningful trading history for purposes of comparison" and the sales were over a nearly two year period of time); *In Silicon Graphics*, 183 F.3d 970, 987-88 (9th Cir. 1999 (holding that an insider who traded 75.3% of his holdings over a fifteen-week period had not engaged in suspicious trading because there was no significant trading history for purposes of comparison."); *In re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d 630, 646 (S.D. Tex. 2001) (finding an inside officer's alleged sales of 37% to be insufficient where there were no facts alleged regarding the insider's trading history which would permit an inference that the sales were inconsistent with prior trading history); *Delarne Partners, Ltd. v. Sync Research, Inc.*, 103 F. Supp. 2d 1209, 1214 (C.D. Cal. 2000) (holding that plaintiff's failure to plead facts sufficient to permit the court to accurately assess what percentage of holdings each of the

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overcome the fact that the pattern and amount of trades to which a defendant has limited himself in implementing such a plan negates an inference of scienter.

[116] Mr. Skilling had another almost 200,000 options vesting in October 2002, (*see* SEC J.A. Tab 20, at 23), yet in the face of this upcoming increase in his available stock, he still ceased selling shares in June 2002 pursuant to his 10b5-1 plan.

[117] We believe that such unvested options should also be rightly considered in assessing the volume of Mr. Skilling's sales. As Hakala readily admits, "insiders will naturally tend to sell their company's shares over time for wealth diversification and liquidity purposes." (Hakala Decl. ¶ 12.) Consequently, the fact that Mr. Skilling knew he had millions of unvested options that would be vesting in the near future would have motivated him to liquidate a larger portion of his Enron stock than he otherwise would have.

[118] (*See* SEC J.A. Tab 22, at 21.)

defendants sold when options are included in the mix was insufficient to support an inference that the sales were unusual); *Head v. Netmanage, Inc.*, No. C 97-4385 (CRB), 1998 WL 917794 *5 (N.D. Cal. 1998) (holding that sales of 76% and 94% were not unusual where they were consistent with the individuals' trading patterns prior to the class period).

Moreover, the fact that Mr. Skilling retained substantial holdings in Enron also rebuts any inference of scienter. *See, e.g., San Leandro*, 75 F.3d at 813-14 (where insiders retain substantial holdings inference of scienter is inappropriate). Here, Mr. Skilling retained more than a million shares in Enron through his departure from the company. Such a substantial stake rebuts any inference of scienter. *Cf. id.*

2. MR. SKILLING'S RESIGNATION FROM ENRON IS NOT SUFFICIENT TO CREATE A STRONG INFERENCE OF SCIENTER

Plaintiffs also use Mr. Skilling's resignation as factual support for a strong inference of scienter. (*See, e.g.*, NCC ¶¶ 57, 340, 342-43, 359.) Plaintiffs' conclusory allegations concerning Mr. Skilling's resignation are simply inadequate to support an inference of scienter.

As the Consolidated Complaint acknowledges, when Mr. Skilling resigned on August 14, 2001 he expressly stated that that he was resigning "solely for personal and family reasons." (*Id.* at ¶ 359.) Plaintiffs have alleged absolutely no facts to dispute the proffered reasons for Mr. Skilling's departure. Consistent with this aspirational pleading, plaintiffs have devised all sorts of fanciful alternative explanations. For example, plaintiffs shamelessly contend that Mr. Skilling "quit because he knew that the Enron house of cards was crumbling," (*id.* at ¶ 57), and that "Skilling and other top Enron insiders concocted a story that Skilling's resignation would be presented as being for "personal reasons," so as to try to conceal the true reasons and limit the damage to Enron's stock from what they knew would be an incendiary

revelation." (*Id.*) These empty assertions, for which plaintiffs have not provided, and cannot provide, factual support, are precisely the sorts of desperate attempts to plead scienter based on an executive's departure that courts have repeatedly held to be insufficient. *See, e.g., In re Azurix Corp. Sec. Litig.*, No. H-00-4034 2002 WL 562819,—F. Supp. 2d—, at * 24 (S.D. Tex. Mar. 21, 2002); *Branca v. Paymentech, Inc.*, No. Civ. A.3:97-CV-2507-L, 2000 WL 145083, at *12 (N.D. Tex. Feb. 8, 2000).

For example, in *Branca*, the plaintiffs alleged that the resignation of a corporation's Chief Financial Officer and Corporate Secretary during the class period and shortly after a restatement of earnings for "personal reasons" was evidence from which a strong inference of scienter could be drawn. *See id.*, at *9. The court, however, disagreed. *See id.*, at *11. There, as here, the court observed:

> While it is clear that Plaintiffs wish to imply that [the Chief Financial Officer's] departure was related to [the] alleged accounting malfeasance, they have pleaded no facts whatsoever to support this inference. These allegations simply do not support any inference of scienter.

Id.

Similarly, in *In re Azurix Corp. Securities Litigation*, Judge Lake was equally dismissive of plaintiffs' attempt to paint individual defendants' resignations as evidence sufficient to support a strong inference of scienter.

> Plaintiffs argue that the timing of some of the individual defendants' resignations establishes scienter. The court disagrees. Gray's resignation, which occurred 13 days after the announcement of 1999 third-quarter results, Faldyn's resignation, which occurred the day after Azurix disclosed contract cancellations and postponements in the second half of 1999, and Mark's resignations, which occurred a few weeks after Azurix's operating results were disclosed on August 8, 2000, do not support a "strong inference" that these defendants knew of or recklessly disregarded the misstatements disseminated by Azurix during the Class Period. If anything, the defendants' resignations indicate that the struggling

company no longer had faith in its executives. This does not raise a strong inference of scienter.

2002 WL 562819, at *24.

Here, Mr. Skilling resigned his position at Enron for personal reasons having nothing to do with the company and plaintiffs have pled no ***facts*** that dispute this. Plaintiffs' rampant speculation about some ulterior motive has absolutely no basis in ***fact***. Consequently, the allegations are insufficient to support an inference of scienter.

3. PLAINTIFFS' ALLEGATIONS CONCERNING MR. SKILLING'S POSITION AT ENRON AND MEMBERSHIP ON COMMITTEES ARE INSUFFICIENT TO SUPPORT A STRONG INFERENCE OF SCIENTER AS A MATTER OF LAW

The only ***facts*** that plaintiffs have been able to plead in their attempt to support a strong inference of scienter as to Jeffrey Skilling are:

- Mr. Skilling was, at times, an Officer and Director of Enron and served on the Management and Executive Committees;
- During the class period, Mr. Skilling exercised some portion of stock options that had vested and sold some Enron stock;
- Mr. Skilling resigned from his position as Enron's CEO on August 16, 2001;
- Enron subsequently decided to restate its earnings in October 2001.

None of these facts, individually or in combination, are sufficient to create a strong inference of scienter. Rather, plaintiffs' allegations are nothing more than an attempt at the same sort of motive and opportunity allegations that this Court and the Fifth Circuit have repeatedly held to be insufficient to create a strong inference of scienter. *See Nathenson*, 267 F.3d at 410-11; *In re Sec. Litig. BMC Software*, 183 F. Supp. at 901. As this Court is well aware, Plaintiffs cannot satisfy their burden of pleading scienter by merely alleging that Mr. Skilling possessed a motive and opportunity to commit securities fraud. *See In re Securities Litig. BMC Software*, 183 F. Supp. at 900-01. Indeed, they have not even succeeded at this attempt, as

discussed above, and, at any rate, more is required. As the Fifth Circuit indicated "it would seem to be a rare set of circumstances indeed where . . . allegations [of motive and opportunity] alone are both sufficiently persuasive to give rise to a scienter inference of the necessary strength." *Nathenson*, 267 F.3d at 412.

As set forth in detail above, plaintiffs' attempt to create a strong inference of scienter as to Mr. Skilling from Enron's restatement of earnings,[119] Mr. Skilling's sales of Enron stock, and Mr. Skilling's resignation from the company are unavailing. *See supra* Sections II.D.1-2. The only other facts alleged in the Consolidated Complaint is that Mr. Skilling was an Officer and Director of Enron who served on the Executive and Management Committee. From these facts plaintiffs infer that Mr. Skilling had access to non-public information at certain points in time. These allegations are insufficient for at least two reasons. First, plaintiffs' allegations are impermissibly group pled in violation of the PSLRA and Rule 9(b). Second, as a matter of law, plaintiffs simply cannot create a strong inference of scienter based upon these two facts.

a. Plaintiffs' Allegations Concerning Mr. Skilling's Position, Membership On Committees Or Access To Non-Public Information Are Impermissibly Group Pled

Throughout the entire Consolidated Complaint plaintiffs continually make allegations concerning what the "Enron Defendants knew,"[120] what the "Enron's officers" did or said,[121] and what information "Enron's Directors" possessed.[122] Such group pleading demonstrates plaintiffs' complete lack of any specific facts concerning Mr. Skilling. Plaintiffs'

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[119] Moreover, the mere fact that Enron's earnings were restated is insufficient to create any inference of scienter with respect to Mr. Skilling, let alone a strong inference. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1020 (5th Cir. 1996) ("'[T]he mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish scienter. The party must know that it is publishing materially false information, or the party must be severely reckless in publishing such information.'") (quoting *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 297 (5th Cir. 1990)).

[120] *See, e.g.*, NCC ¶¶24, 121(h), 155(n), 396, 433, 506, 534, 587, 591.

[121] *See, e.g.*, NCC ¶¶60, 86, 395, 398, 399, 406, 581.

group pleading is particularly egregious with respect to allegations concerning what Mr. Skilling must have known by virtue of his position, membership on certain committees, and access to non-public information.

For example, the Consolidated Complaint alleges:

> The Enron Defendants who were on Enron's Management Committee were the top executives of Enron. They had daily contact with each other while running Enron as "hands-on" managers, dealing with the important issues facing Enron's business, *i.e.* WEOS, EES, EBS, its JEDI and LJM partnerships and the related SPEs and Enron's future revenues and profits.[123]
>
> The Enron directors who were on Enron's Executive, Finance and Audit Committees were much more involved in Enron's day-to-day operations than is normally the case with "outside directors." ....[124]
>
> Because of the Enron Defendants' positions with the Company, they each had access to the adverse non-public information about its business, partnerships, and investments, finances, products, markets and present and future business prospects via access to internal corporate documents (including the Company's operating plans, budgets and forecasts and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees....[125]
>
> ...[T]he Enron Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading ....by virtue of their receipt of information reflecting the true facts regarding Enron, their control over, and/or receipt and/or modification of Enron's allegedly materially misleading misstatements and/or their association with the Company which made them privy to confidential proprietary information concerning Enron....[126]

These allegations simply lump Mr. Skilling in with numerous other officers,

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[122] *See e.g.*, NCC ¶¶ 60, 395, 398.

[123] NCC ¶ 397.

[124] NCC ¶ 398.

[125] NCC ¶ 399.

[126] NCC ¶ 400.

directors and/or employees of Enron based upon his employment positions or committee memberships. Such an approach is patently insufficient to satisfy the plaintiffs' burden. The PSLRA expressly requires that plaintiffs "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Several Fifth Circuit courts, including this one, have found this requirement to be wholly inconsistent with just this sort of group pleading. *See, e.g., In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 902 n.45 ("Because this Court believes a more stringent pleading is required by the PSLRA, it agrees . . . the group pleading doctrine is at odds with the PSLRA and has not survived the amendments."); *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 (N.D. Tex. 1998) ("This requirement is fairly interpreted to require that a plaintiff allege facts regarding scienter as to each defendant. So interpreted, . . . it would be nonsensical to require that a plaintiff specifically allege facts regarding scienter as to each defendant, but to allow him to rely on group pleading . . . .").

b. Plaintiffs' Allegations Concerning Mr. Skilling's Position, Membership On Committees Or Access To Non-Public Information Are Insufficient To Support A Strong Inference Of Scienter As A Matter Of Law

Courts have repeatedly rejected attempts, just like those of plaintiffs, in this case to infer scienter from an individual's position and access to non-public information. *See, e.g., In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 541-42 (3d Cir. 1999) ("[A]llegations that a securities-fraud defendant, because of his position within the company, 'must have known' a statement was false or misleading are 'precisely the types of inferences which [courts], on numerous occasions, have determined to be inadequate to withstand Rule 9(b) scrutiny.'") (alterations in original) (citing *Maldonado v. Dominiguez*, 137 F.3d 1, 10 (1st Cir. 1998) (holding that allegations that two vice-presidents of large financial institutions "must have

known" of the risks of margin calls that ultimately caused failure of corporation are "precisely the types of inferences which [courts], on numerous occasions, have determined to be inadequate to withstand Rule 9(b) scrutiny.")).[127] The mere fact that Mr. Skilling was an Officer and Director of Enron and he may have had access to non-public information at certain points in time is simply insufficient to create a strong inference of scienter as a matter of law.

In fact, plaintiffs' allegations bear a striking similarity to those presented in *In re Advanta Corp. Sec. Litig.*, where the Complaint made blanket allegations that the defendants must have been aware of impending losses that the corporation was going to suffer by virtue of their positions in the company. 180 F.3d at 539. The Third Circuit flatly rejected such allegations as insufficient to satisfy the PSLRA's scienter requirement. *See id.*

> [A]llegations that a securities-fraud defendant because of his position within the company, "must have known" a statement was false or misleading are "precisely the types of inferences which [courts], on numerous occasions have determined to be inadequate to withstand Rule 9(b) scrutiny.

Id. (citations omitted) (second alteration in original); *see also Rosenblum v. Adams, Scott & Conway, Inc.*, 552 F.2d 1336, 1339 (7th Cir. 1977) ("A director, officer or even the president of a

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[127] *See also Branca v. Paymentech, Inc.*, 2000 WL 145083, at *11 (N.D. Tex. Feb. 8, 2000) (conclusory allegations of scienter based upon executive positions, involvement in day-to-day management, access to internal corporate documents, conversations with corporate officers and employees, and their attendance at management and board meetings is not sufficient to plead scienter); *Lirette v. Shiva Corp.*, 27 F. Supp. 2d 268, 283 (D. Mass. 1998) (finding that "inferences that the defendants by virtue of their position within the company, 'must have known about the company's problems when they undertook the allegedly fraudulent actions' . . . are precisely the types of inferences which this court, on numerous occasions, has determined to be inadequate to withstand the special pleading requirements in securities fraud cases." (quoting *Maldonado*, 137 F.3d at 9)); *In re NAHC, Inc. Sec. Litig.*, 2001 WL 1241007 *18 (E.D. Pa.) ("Blanket statements that the defendant must have been aware of impending losses or that a statement was false or misleading by virtue of his position within the company are inadequate to withstand Rule 9(b) or PSLRA scrutiny. . . . Where plaintiffs contend that the defendants had access to contrary facts, they must specifically identify the reports or statements containing this information. . . . In the absence of any allegations regarding the factual content of any single report received by the Individual Defendants that would have provided a basis for advance knowledge of the falsity of their statements, . . . the plaintiffs' allegations that the NovaCare Defendants must have known that the statements were misleading through virtue of their positions within the Company are insufficient to adequately plead conscious or reckless behavior." (internal citations omitted)); *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 (N.D. Tex. 1998) ("Plaintiffs must properly plead wrongdoing and scienter as to each individual defendant and cannot merely rely on the individuals' positions or committee memberships within the . . . organization.")

corporation often has that superior knowledge and information, but neither the knowledge nor the information attaches to those positions.")

Similarly, plaintiffs' allegations that Mr. Skilling "acted with scienter "because of [his] position with the Company, [and the fact that he] had access to the adverse non-public information,"[128] is insufficient as a matter of law. Plaintiffs simply have failed to allege any specific facts that demonstrate Mr. Skilling possessed the requisite level of scienter necessary to support their claim. Consequently, plaintiffs cannot state a claim for relief against Mr. Skilling under Section 10(b) or Rule 10b-5.

III. PLAINTIFFS' CLAIM UNDER SECTION 20A OF THE EXCHANGE ACT FAILS BECAUSE THERE IS NO PREDICATE VIOLATION

To state a claim under Section 20A of the Exchange Act, plaintiff must allege with particularity facts showing that defendant committed an underlying violation of insider trading under Rule 10b-5 at the same time that the plaintiff purchased those shares. *In re Cendant Corp. Litig.*, 60 F. Supp. 2d 354, 378 (D.N.J. 1999); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1130-31 (W.D. Mich. 1996) (citing *In re AST Research Sec. Litig.*, 887 F. Supp. 231, 235 (C.D. Cal. 1995) (Section 20A claims sound in fraud and must be plead with particularity); *Plack v. Cypress Semiconductor* (In re Cypress Semiconductor Sec. Litig.), 864 F. Supp. 957 (N.D. Cal. 1994) ("contemporaneous" means trades occurred on same day). An underlying violation of Exchange Act Section 10(b) and Rule 10b-5 for insider trading, requires evidence that an insider has: (1) traded in the securities of his corporation; (2) on the basis of; (3) material; (4) nonpublic information; (5) with scienter. *United States v. O'Hagan*, 521 U.S. 642, 649 (1997). As set forth in detail above, plaintiffs have failed to plead facts sufficient to satisfy either of the elements of an insider trading claim against Mr. Skilling.

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[128] NCC ¶ 399.

Because plaintiffs have not pled an underlying violation, their Section 20A claim must fail as well.

First, plaintiffs have failed to plead any facts sufficient to demonstrate that Mr. Skilling traded on the basis on material non-public information. As set forth in detail above, the only material non-public information that plaintiffs cite to support such a claim is Enron's allegedly irregular accounting practices and financial condition. Plaintiffs have not plead any specific facts sufficient to demonstrate that Mr. Skilling was aware of information concerning Enron's allegedly improper accounting practices, GAAP errors, or accounting determination. (*See supra* II.A.2.)

Second, there is simply no factual basis to support an inference of scienter with respect to Mr. Skilling's sales pattern. (*See supra*, II.D.1.) Mr. Skilling's sales were not made at suspicious times or in suspicious quantities. (*See id.*) Absent facts to support such an inference, plaintiffs cannot establish that Mr. Skilling's trades were made with scienter.

IV. PLAINTIFFS' CLAIMS OF LIABILITY UNDER SECTION 11 OF THE SECURITIES ACT AGAINST MR. SKILLING SHOULD BE DISMISSED BECAUSE PLAINTIFFS ALLEGATIONS PLEAD AFFIRMATIVE DEFENSE AND MANDATE DISMISSAL

Plaintiffs have asserted that, based upon allegedly misleading information contained in the registration statements of four offerings of Enron securities, that Mr. Skilling has liability pursuant to Section 11 of the Securities Act.[129] These claims must be dismissed for failure to state a claim upon which relief can be granted as plaintiffs have conclusively plead the facts establishing an affirmative defense for Mr. Skilling based upon his reliance on "expert opinions" pursuant to §11.

[129] These offerings include (1) $500 million offering of 7.375% notes due 5/15/19, dated 5/19/99; (2) $222 million offering of 7% Exchangeable notes due 7/31/02, dated 8/10/99; (3) $500 million offering of 8.375% notes due

Section 11 provides purchasers of a registered security a private cause of action against certain enumerated parties when there has been a material misstatement or omission in a registration statement. 15 U.S.C. § 77k. In addition, § 11 explicitly provides a safe harbor for directors who sign a registration statement in good faith reliance upon expertized disclosures. Under §11, a showing of due diligence or reliance on expertized opinion, in connection with the registration statement, obviates liability for a non-expert, non-issuer signatory, or director, such as Mr. Skilling, and provides an affirmative defense barring relief. It reads in pertinent part:

> "[N]o person . . . shall be liable . . . who shall sustain the burden of proof [that] . . . as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe ... that the statements therein were untrue."

15 U.S.C. § 77k(b)-(c)(3)(c); *see also Lone Star Ladies Inv. Club v. Schlotsky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001) (noting it is a "hornbook principle[] of securities law," that "[d]efendants other than the issuer can avoid liability by demonstrating due diligence") (*citing Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 623 (9th Cir. 1994) (section 11 claims barred against individuals who may establish due diligence or reliance on experts defense); *Escott v. Barchris Constr. Corp.*, 283 F. Supp. 643, 688-89 (S.D.N.Y. 1968) (holding that outside directors had a due diligence defense to §11 based upon expertized portions of the registration statements reflecting work by the independent auditors); *In re Worlds of Wonder Sec. Litig.*, 814 F. Supp. 850 (N.D. Cal. 1993) (defendants reliance on accountants' decisions which are the basis for plaintiffs' §11 claim represent the type of information on which §11 permits non-experts to rely), *rev'd on other grounds*, 35 F.3d 1407 (9th Cir. 1994).

5/23/05 and 7.875% notes due 6/15/03, dated 5/18/00; and (4) $1.9 billion offering of Zero coupon notes due 2021,

The alleged false and misleading information, which plaintiffs contend was contained in Enron's registration statements in connection with four registered offerings, consists of the "financial statements and results" of Enron.[130] Yet, plaintiffs also assert that prior to issuance of each of the subject registration statements, Arthur Andersen represented that "Enron's financial statements...were presented in accordance with GAAP and that Andersen's audits of Enron's financial statements had been performed in accordance with ...GAAS."[131] Indeed, throughout their complaint, plaintiffs provide extensive support for Mr. Skilling's reasonable reliance on the expert authority of Arthur Andersen with respect to the financial disclosures in the registration statements. Plaintiffs not only fail to aver a single fact demonstrating that Mr. Skilling had no reasonable basis to believe that such financial statements were untrue or that his reliance on Arthur Andersen was unreasonable, but Plaintiffs allege:

> "Andersen...was involved in every facet of Enron's business. Andersen audited Enron's financial statements, it acted as internal auditors for Enron, it prepared Enron's tax returns, it provided consulting services on a wide range of topics and consulted on the accounting for the very transactions at issue in this litigation throughout the Class Period." (NCC ¶897.)
>
> "Andersen... was intimately familiar with Enron's business affairs and its personnel were present at Enron's Houston headquarters on a year-round basis." (NCC ¶897.)
>
> "Andersen also consented to the incorporation of its reports on Enron's financial statements in Enron's Form 10-Ks ... and in Enron's Registration Statements ... [and] consented to the use of its name as an expert in each Prospectus filed and issued pursuant to these offerings, including the Prospectus for the Zero Coupon Notes filed on 7/25/01." (NCC ¶899.)
>
> "We conducted our audits in accordance with auditing standards generally accepted in the United States. Those standards require

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dated 7/18/01. NCC ¶1006.

[130] *See* NCC ¶121(a); see also, ¶164 ("these financial results were false");¶ 610 (alleging the "financial results...violated GAAP"); ¶613 (alleging the Forms 10-K were "false").

[131] NCC ¶899.

> that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. ...In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Enron Corp. and subsidiaries...and the results of their operations, cash flows and changes in shareholders' equity... in conformity with accounting principles generally accepted in the United States." (NCC ¶903.) (*citing Andersen's representation in a report dated 2/23/98 to the Shareholders and Board of Directors of Enron Corp. in its Annual Report, which Plaintiffs represent was substantially identical to representations made by Andersen throughout the Class Period.* (NCC ¶904.)

Plaintiffs have also plead that Arthur Andersen went further, and represented in a separate opinion letter, "To the Shareholders and the Board of Directors of Enron Corp.," contained in the same Annual Reports relied upon in the Complaint at ¶¶ 136-140, 215-219, 293-297, 397, and 903-904 that the internal controls, in reliance upon which the financial statements of the company were prepared, were compliant with the standard required by law.

> "We have examined management's assertion that the system of internal control of Enron Corp.... and subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements... In our opinion, management's assertion that the system of internal control of Enron Corp. and its subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements."

Plaintiffs have further alleged that Vinson & Elkins, and other legal experts, provided expert authority for the entirety of the registration statements, other than those covered exclusively by the accountants. With regard to Vinson & Elkins, plaintiffs allege:

> "Vinson & Elkins ... drafted and/or approved the adequacy of Enron's press releases, shareholder reports and SEC filings (including 10Ks and Registration Statements alleged in this Complaint which Vinson & Elkins knew were false and misleading)." (NCC ¶ 801.)

> "Vinson & Elkins drafted and approved Enron's related-party disclosures ... in ... SEC filings of Enron [including certain SEC filings and Annual Reports]: . . .
>
> Enron's related-party disclosures from the Company's previous Report on Form 10-K and Report on Form 10-Q were also incorporated by reference into the following Prospectus and Registration Statements of Enron for various securities [including all offerings referenced in the §11 claim]. (NCC ¶ 824.)

Because of the absence of factual allegations that Mr. Skilling was aware of any untruth in the registration statements and based upon Arthur Andersen's unqualified certifications, and the multiple expert accounting and legal opinions cited in the Complaint, Plaintiffs, in effect, have plead that Mr. Skilling had "no reasonable ground to believe" that any part of the registration statements was untrue. Indeed, plaintiffs' allegations with respect to the scope of Arthur Andersen's involvement in all facets of Enron's business and the strength with which they presented their opinions as to the soundness and accuracy of Enron's financials, as well as documents relied upon in their Complaint (*e.g.* Enron's Annual Reports, Forms 10-K and 10-Q), in effect plead that plaintiffs' Section 11 claim against Mr. Skilling is barred by the affirmative defense of reliance on expertized reports. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (A complaint that shows relief to be barred by an affirmative defense is subject to dismissal for failure to state a cause of action.) (*citing United Transp. Union v. Florida E. Coast Ry.*, 586 F.2d 520, 527 (5th Cir. 1978); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977); *Joe E. Freund, Inc. v. Ins. Co. of North America*, 370 F.2d 924, 924 (5th Cir. 1967); *J.M. Blythe Motor Lines Corporation v. Blalock*, 310 F.2d 77, 78 (5th Cir. 1962); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958)). Where plaintiffs allege facts on the face of their own pleading that support a defendant's affirmative defense, dismissal is appropriate. *Arrizza v. Jefferson Guaranty Bank,* 696 F. Supp. 204 (E.D. La. 1988) (where plaintiffs allegations are self-contradictory, claims cannot survive a motion to

dismiss). Accordingly, plaintiffs' §11 claims against Mr. Skilling should be dismissed.

V. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR CONTROLLING PERSON LIABILITY

Plaintiffs have failed to state a claim for controlling person liability against Jeffrey Skilling under either § 15 of the Securities Act[132] (Third Claim for Relief) or § 20(a) of the Exchange Act[133] (First Claim for Relief). Sections 15 and 20(a) establish derivative liability for persons who "control" those who have primary liability under the Securities Act and Exchange Act respectively. *In re BMC Software*, 183 F. Supp. 2d 860, 869 n.17 (S.D. Tex. 2001). Plaintiffs' claims against Mr. Skilling pursuant to these sections fail as (1) they have failed to satisfy the elements of controlling person liability, and (2) having alleged primary violations against Mr. Skilling under these same predicate sections, they cannot allege secondary liability as well.

A. PLAINTIFFS FAIL TO MAKE A *PRIMA FACIE* CASE FOR LIABILITY

To establish a *prima facie* case of liability under either §15 or the Securities Act or §20(a) of the Exchange Act, plaintiffs must show (1) a primary violation of the federal securities laws and (2) that the alleged controlling person possessed, directly or indirectly, the power to direct or cause the direction of management and policies of the individual allegedly liable for the primary violation. *Collmer v. U.S. Liquids, Inc.*, Civ. Act. No. H-99-2785, 2831, 3015, 3036, 3068, 3148, 3796 2001 U.S. Dist. LEXIS 23518, at *107 (S.D. Tex. Jan. 23, 2001);

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[132] Under § 15 of the Securities Act: "Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency or otherwise, controls any person liable under sections 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of facts by reason of which the liability of the controlled person is alleged to exist."

[133] Under §20(a) of the Exchange Act: "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

Dennis v. Gen. Imaging, Inc., 918 F.2d 496, *503-04 (5th Cir. 1990) (setting forth the *prima facie* case under §§15 and 20(a)); *McNamara v. Bre-X Minerals LTD.*, 46 F. Supp. 2d 628, 638 (E.D. Tex. 1999). Plaintiffs have not done so in this case.

First, plaintiffs have failed to sufficiently plead controlling person liability because, as addressed *supra* at Section IV, they have not sufficiently alleged primary violations of §11 of the Securities Act, the predicate liability under §15, or primary violations of §10(b) of the Exchange Act, the predicate to liability under §20(a), against a person(s) over which Mr. Skilling allegedly had control. *See Dennis*, 918 F.2d at 509; *Abbot v. The Equity Group, Inc.*, 2 F.3d 613, 619-620 (5th Cir. 1993) (to prevail on a claim under §20(a) of the Exchange Act, plaintiff must establish an underlying violation of the federal securities laws); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1021, n. 8 (5th Cir. 1996) (because plaintiffs have failed to state a claim for any predicate securities fraud offense under 10(b), plaintiffs have necessarily failed to state a claim for controlling person liability under 20(a).); *Lemmer v. Nu-Kote Holding, Inc.*, Civ. Act. No. 3:98-CV-0161-L 2001 U.S. Dist. LEXIS 13978, at *42 (N.D. Tex. 2001) (A claim for controlling person liability cannot succeed if the underlying claims against the primary violator are fail due to the PSLRA particularity requirements and inadequate allegations of scienter.). Without a primary violator, there can be no controlling person liability. *Lemmer*, 2001 U.S. Dist. LEXIS 13978, *42.

Second, as plaintiffs have failed to identify the controlled person(s), they cannot satisfy the second prong requiring that they plead facts to sufficiently establish that Mr. Skilling "actually exercised control over the primary violator's general affairs or merely that the control person had the power to exercise such control." *Collmer*, 2001 U.S. Dist. LEXIS 23518, *14 n.11 (Plaintiffs need to show that the alleged control persons possessed "the power to control

[the primary violator].") (*citing Abbott v. Equity Group, Inc.*, 2 F.3d 613, 620 (5th Cir. 1992)).

Plaintiffs fail to allege control by Mr. Skilling over a primary violator in anything but the most conclusory fashion. For example, plaintiffs simply allege, with respect to the §15 claim:

> "By reasons of the conduct herein alleged, each defendant violated, and/or in violation of §15 of the Securities Act controlled a person who violated, §11 of the Securities Act." (NCC ¶ 1014.)

This is insufficient as a matter of law. plaintiffs must identify a primary violator(s) and allege facts sufficient to demonstrate actual control over the primary violator(s) and the transactions in question in order to establish control person liability. *See In re Blech Sec. Litig.*, 961 F. Supp. 569, 586-87 (S.D.N.Y. 1997).

Moreover, it is well-settled that certain types of allegations, in and of themselves, will not state a claim for controlling person liability. Specifically, allegations of a defendant's status as an officer and director are insufficient to establish control under §15 or §20(a) as to a corporate issuer. *See Dennis*, 918 F.2d at 509 (A defendant's status as director "alone will not automatically cause [the defendant] to be deemed a Section 15 or 20 controlling person."); *In re Sotheby's Holdings, Inc. Sec. Litig.*, 00 Civ. 1041 (DLC), 2000 U.S. Dist. LEXIS 12504, at *24 (S.D.N.Y. Aug. 31, 3000); *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999) ("Officer or director status alone does not constitute control."). Likewise, allegations that the defendant owns stock do not state a claim for controlling person liability. *See Dennis*, 918 F.2d at 509 (minority shareholder status insufficient). Plaintiffs have done no more than this.

Defendants can avoid liability for controlling person liability by affirmatively proving lack of participation and/or good faith. *Thompson v. Partridge*, 636 F.2d 945, 958 (5th Cir. 1981). The good faith affirmative defense can be established by affirmatively proving that the defendant's supervision was adequate and that he did not know of the conduct of the primary

violator, nor could he have reasonably known of it. *Dennis*, 918 F.2d at 509 (*citing Thompson v. Partridge*, 636 F.2d 945, 958 (5th Cir. 1981); *Swenson v. Engelstad*, 626 F.2d 421, 428 (5th Cir. 1980)). The question posed by the court in this inquiry is whether the controlling person "'failed to establish, maintain or diligently enforce a proper system of supervision and control.'" *Thompson*, 636 F.2d at 958 (*quoting Paul F. Newton & Co. v. Tex. Commerce*, 630 F.2d 1111, 1120 (5th Cir. 1980)).

Based upon Arthur Andersen's unqualified certifications, Mr. Skilling had no reasonable grounds to believe that Enron's system of controls was anything but proper. As Arthur Andersen represented in an opinion letter "To the Shareholders and the Board of Directors of Enron Corp." contained in the same Annual Reports relied upon in the Complaint at NCC ¶¶ 136-140, 215-219, 293-297, 397, and 903-904:

> "We have examined management's assertion that the system of internal control of Enron Corp.... and subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements... In our opinion, management's assertion that the system of internal control of Enron Corp. and its subsidiaries...was adequate to provide reasonable assurance as to the reliability of financial statements."

Plaintiffs' allegations with respect to Arthur Andersen's representations regarding the adequacy of Enron's system of controls conclusively establish that plaintiffs' controlling person liability claim against Mr. Skilling is barred by the affirmative defense of good faith.[134] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (A complaint that shows relief to be barred by an affirmative defense is subject to dismissal for failure to state a cause of action.) (*citing United Transp. Union v. Florida E. Coast Ry. Co.*, 586 F.2d 520, 527 (5th Cir. 1978); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977); *Joe*

[134] In addition, Plaintiffs have not sufficiently plead Mr. Skilling's direct participation in any primary violator's activities to preclude his reliance on the affirmative defense of "lack of participation."

E. Freund, Inc. v. Ins. Co. of North America, 370 F.2d 924, 924 (5th Cir. 1967); *J.M. Blythe Motor Lines Corporation v. Blalock*, 310 F.2d 77, 78 (5th Cir. 1962); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958)). While plaintiffs are permitted to plead alternative theories of liability, where they allege facts within their own document that support a defendant's affirmative defense, dismissal is appropriate. *Arrizza, et al. v. Jefferson Guaranty Bank, et al.*, 696 F. Supp. 204 (E.D. La. 1988) (where plaintiffs allegations are self-contradictory, claims cannot survive a motion to dismiss). Accordingly, plaintiffs §§15 and 20(a) claims against Mr. Skilling should be dismissed.

B. THERE CANNOT BE CONTROLLING PERSON LIABILITY WHERE DEFENDANT IS CHARGED WITH PRIMARY VIOLATION

Sections 15 and 20(a) claims cannot be asserted against a defendant, such as Mr. Skilling, who has also been charged with primary violation of the derivative section. That is, claims of primary liability and secondary liability are mutually exclusive. Put differently, a plaintiff alleging primary violations against a defendant cannot supplement or tack on claims for secondary liability against the defendant. *Lemmer v. Nu-Kote, Inc.*, 2001 U.S. Dist. LEXIS 13978, at *41-42 (N.D. Tex. 2001) (*citing Kalnit v. Eichler*, 85 F. Supp. 2d 232, 246 (S.D.N.Y. 1999)). In *Lemmer*, plaintiffs claimed both §10(b) and §20(a) liability against the Chairman and CEO of Nu-Kote, David Brigante. The Court found that since primary liability had already been plead against Mr. Brigante, he was entitled to dismissal of the §20(a) claim. *Lemmer*, 2001 U.S. Dist. LEXIS 13978, at *42. Similarly, in *Kalnit*, the Second Circuit held that because the individual Directors of MediaOne were alleged to be primary violators under §10(b), plaintiffs' §20(a) claim had to be dismissed as a matter of law. *Kalnit*, 85 F. Supp. 2d at 246. Here, because plaintiffs assert §11 and §10(b) claims directly against Mr. Skilling, they are precluded, as a matter of law, from asserting claims against him pursuant to § 15 and §20(a) as well.

Lemmer, 2001 U.S. Dist. LEXIS 13978, *42 (Because plaintiff asserted a primary claim against defendant, he was precluded from asserting a §20(a) claim, even though the §20(a) claim would have failed on its own for plaintiff's voluntary dismissal of the primary violator.); *Kalnit*, 85 F. Supp. 2d at 246 (Because plaintiff alleges primary liability for defendants, under plaintiff's own theory defendants could not be control persons, §20(a) does not apply and must be dismissed as a matter of law pursuant to Rule 12(b)(6).).

In sum, plaintiffs' failure to sufficiently allege a *prima facie* case under §15 and §20(a), as well as their maintaining claims for primary liability against Mr. Skilling under the same predicate sections of the Securities Act and Exchange Act, respectively, is fatal to their claims against him for controlling person liability. Accordingly, these claims should be dismissed.

VI. THE COURT SHOULD ALSO DISMISS PLAINTIFFS' TEXAS STATE SECURITIES ACT CLAIMS

A. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD THAT MR. SKILLING IS DIRECTLY LIABLE UNDER THE TEXAS SECURITIES ACT

Plaintiff Washington Board caps off the Complaint with a claim for relief under Article 581-33A(2) of the Texas Securities Act ("TSA"), based on Enron's sale of 6.40% and 6.95% Notes.[135] Article 581-33A(2) states in relevant part:

> A person who *offers or sells* a security . . . *by means* of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *is liable to the person buying the security from him* . . . .

TEX. REV. CIV. STAT. ANN. art. 581-33A(2) (Vernon 2001) (emphasis added). The pertinent phrase "person who offers or sells" is taken from federal law and is intended to have the same meaning. TEX. REV. CIV. STAT. ANN. art. 581-33 cmt.; *see also* House Study Group, Texas

House of Representatives, Daily Floor Report for May 5, 1977, Texas Securities Act § 33 (1977), Civil Liabilities, Pre-Legislative and Legislative History (unpublished) (on file with the Underwood Law Library, Southern Methodist University), attached as Exhibit F, ("One purpose [of the bill enacting Article 581-33A(2)] is to bring the Texas civil liabilities law into line with federal law."). Because Article 581-33A(2) is modeled after Section 12(2) of the Securities Act of 1933,[136] courts have looked to federal cases interpreting Section 12(2) for assistance in construing Article 581-33A(2).[137] Plaintiffs' allegations under this article fail for three distinct reasons, set forth below, any one of which justifies dismissal of their claim.

1. MR. SKILLING'S ALLEGED PARTICIPATION IN THE PREPARATION OF OFFERING DOCUMENTS ARE INSUFFICIENT TO ESTABLISH THAT HE "OFFERED OR SOLD" ENRON NOTES.

Plaintiffs claim that Mr. Skilling is liable under the TSA because he "participated in the offer to sell and sold"[138] by "prepar[ing], review[ing] and/or sign[ing] the Registration Statement and/or Prospectus."[139] The law invoked by plaintiffs, however, applies to a "person who offers or sells" securities—not a person who merely "participates" in such an offer or sale.

> [I]n *Stone v. Enstam*, 541 S.W.2d 473 (Tex. Civ.App. 1976), the Texas court ... limited the term 'seller' to the actual seller and one who acts as an agent for either the buyer or seller in carrying out the sale itself. 541 S.W.2d at 480. ***This decision limits the TSA to those who are actively engaged in the sale process and prevents it***

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[135] NCC ¶¶ 1017-1030. The claim is brought on behalf of a putative sub-class of state boards.

[136] Section 12(2) states that any person who "offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable to the person purchasing such security from him." *See* 15 U.S.C. § 77d(2) (1997). The wording of Article 581-33A(2) is virtually identical. *See* quoted portion of Article 581-33A(2), *supra*.

[137] *See, e.g., Duperier v. Texas State Bank*, 28 S.W.3d 740, 753 (Tex. App. 2000) (interpreting Article 581-33A(2) by reference to federal cases interpreting Section 12(2)); *see also, e.g., Campbell v. C.D. Payne & Geldermann Sec., Inc.*, 894 S.W.2d 411, 417 (Tex. App. 1995) (relying on *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) interpreting federal law, in determining whether a promissory note at issue was a 'security' within the meaning of the Texas Security Act).

[138] NCC ¶ 1020.

[139] NCC ¶ 1021.

> ***from reaching those who merely participate in preparing an offering.***

Huddleston v. Herman & MacLean, 640 F.2d 534, 551 (5th Cir. 1981), *aff'd in part and remanded on other grounds*, 459 U.S. 375 (1983).[140] Courts interpreting the analogous federal Section 12(2), have likewise held that active participation in the actual solicitation of the particular security is necessary under the relevant definition of "seller":

> There is no support in the statutory language or legislative history for expansion of § 12(1) primary liability beyond persons who pass title and persons who "offer," including those who "solicit" offers. Indeed, § 12's failure to impose express liability for ***mere participation*** in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants' collateral to the offer or sale.

Pinter v. Dahl, 486 U.S. 622, 650 (1988) (emphasis added).

Plaintiffs' implication that Mr. Skilling's "participation" constituted active solicitation based only on his preparation, review or signature falls well short of alleging liability. Merely having an identifiable role in the process of completing the physical document upon which a sale of securities is eventually based, is simply not enough under the statute. *See Huddleston*, 640 F.2d at 538-39 (holding that "corporate officers and accountants who prepare the corporate issuer's prospectus in connection with a securities offering" are not sellers of those

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[140] To directly address the liability of remote defendants, the 1977 amendments to Article 581-33 added a new section, Article 581-33F, that deals specifically with aider and abettor liability. The comment to the 1977 amendments notes:

> Old § 33A allowed recovery only from "any person who sells." Although the phrase would presumably be broadly construed, *see Brown v. Cole*, 155 Tex. 652, 291 S.W.2d 704, 59 ALR 2d 1011 (1956), its scope was unclear, particularly since the 1963 language could be read as narrower than the prior language interpreted in *Brown v. Cole*. In any event, *Brown v Cole should have no application to the new law, since § 33F provides quite specifically who, besides a person who buys or sells, is liable, and the criteria for such liability.*

TEX. REV. CIV. STAT. ANN. art. 581-33, cmt. (Vernon Supp. 1998) (emphasis added).

securities under the Texas Securities Act).[141] Indeed, even personal contact with investors regarding potential purchases – which plaintiffs here cannot and do not allege – would be insufficient without allegations of a particular role in soliciting or selling the actual securities at issue, or an allegation of direct financial benefit from their sale.[142] *See Marshall v. Quinn-L Equities*, 704 F. Supp. 1384, 1389-91 (N.D. Tex. 1988) (holding that the law firm that allegedly "'assisted in the sales of the limited partnership interests'" had not "solicited" securities, and was not a "seller" under 581-33A(2), despite their involvement in "preparing the private placement memoranda" and "being available to talk to investors about investing in the limited partnerships, directly communicat[ing] to investors over the telephone and through their tax and securities opinions . . ., and, at least on one occasion, participat[ing] in a tax seminar directed at investors or potential investors.").

Here, plaintiffs do not allege that Mr. Skilling actually and directly solicited or sold the subject notes to any of the plaintiffs, or that Mr. Skilling was motivated by any direct financial benefit as a result of plaintiffs' notes purchases.[143] Unable to allege that Mr. Skilling was the issuer – *i.e.*, the "person who offers or sells a security" – plaintiffs' claim must fail under the plain language of the statute. *See* TEX. REV. CIV. STAT. ANN. art. 581-33A(2).

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[141] *See also Pinter*, 486 U.S. at 648-51, n.24 (declining to adopt the Fifth Circuit's definition of a "seller" as one "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place"); *In re Chaus Sec. Litig.*, No. 88 Civ. 8641 (SWK) 1990 WL 188921, at *9 (S.D.N.Y. Nov. 20, 1990) ("mere collateral participants who sign a registration statement . . . could not be liable . . . under § 12 unless they also satisfied the definition for statutory seller") (citing *Pinter*, 486 U.S. at 650 & n. 26).

[142] *See Pinter*, 486 U.S at 643-45 & n.21 (holding that buyers may only recover from their immediate sellers and those who solicit the transaction for their own financial gain, such as a stockbroker who recommends a purchase in hopes of receiving a commission); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1113-15 (5th Cir. 1988) (same), *vacated on other grounds*, 492 U.S. 914 (1989).

[143] Although Plaintiffs' allege that JP Morgan and Lehman Brothers had a pecuniary interest in the sale of the notes NCC ¶ 1023, there are no similar allegations made with respect to any of the Individual Defendants, including Mr. Skilling.

2. PLAINTIFFS' ALLEGATIONS THAT MR. SKILLING INDUCED THEM TO PURCHASE THE NOTES ARE INSUFFICIENT AS A MATTER OF LAW

In addition to alleging that the defendant is a "seller" of securities (which plaintiffs fail to do), a plaintiff must also allege that "misleading statements by [the defendant] that relate to the security purchased . . . induced the purchase thereof" to state a claim under 581-33A(2). *See, e.g., Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 475 (Tex. App. 2001). The Consolidated Complaint, however, fails to allege that any statement made by Mr. Skilling induced plaintiffs' purchase of the notes, and, in fact, by its own admission negates the possibility.

Plaintiffs admit that the primary reason the purchase was made was the price of the notes. (*See* NCC ¶ 1025) ("The Washington Board and the Note Subclass would not have purchased the ... Notes ... at the prices they paid, or at all, if they had been aware that the prices had been artificially inflated....").) Although plaintiffs contend that statements by Mr. Skilling had an inflationary effect on the price of the notes, ***they fail to allege those statements had any effect on they, themselves*** – much less one so strong as to induce their action. Plaintiffs do not even allege that they read the Registration Statements or Prospectuses, or were aware, prior to their purchases, of any of the alleged misstatements strewn throughout the previous 1,000 paragraphs. As such, they have neglected to plead that Mr. Skilling's alleged sale of the notes was "by means" of any untrue statements, as required under the TSA.[144]

3. ALLEGATIONS REGARDING THE ACQUISITION OF THE SUBJECT NOTES ARE INSUFFICIENT TO ESTABLISH THE NECESSARY PRIVITY BETWEEN MR. SKILLING AND PLAINTIFFS.

Plaintiffs also fail to allege the necessary privity required by the plain language of

[144] Even if the Plaintiffs are allowed to rely on the alleged *effect* of statements by Mr. Skilling, rather than on the statements themselves, the exhaustive discussions of Plaintiffs' federal securities laws claims demonstrate that

Article 581-33A(2). The Texas statute states that a defendant is liable only to "the person buying the security from him." *See* TEX. REV. CIV. STAT. ANN. art. 581-33A(2). "[This] is a privity provision, allowing a buyer to recover from his offeror or seller." TEX. REV. CIV. STAT. ANN. art. 581-33 cmt. Here, however, there is no direct relationship between plaintiffs and Mr. Skilling before this Court, and no allegation that plaintiffs bought their notes from Mr. Skilling.[145] Importantly, because plaintiffs' TSA claim is based solely on the sale of notes, and because there has been no allegation that any of the Individual Defendants, including Mr. Skilling, sold Enron debt securities on the open market or to plaintiffs directly, none of the plaintiffs could have purchased the notes from Mr. Skilling, and the required privity cannot be established.

B. PLAINTIFFS HAVE FAILED TO ALLEGE AIDER AND ABETTOR LIABILITY UNDER TEXAS SECURITIES ACT, ARTICLE 581-33F(2), WHICH CONTAINS A SCIENTER REQUIREMENT.

In addition to their claim of primary liability under the TSA, plaintiffs also seek to hold Mr. Skilling liable derivatively under Article 581-33F(2). This article imposes liability on "a person who directly or indirectly ***with intent*** to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer." *See* TEX. REV. CIV. STAT. ANN. art. 581-33F(2) & cmt. (peripheral defendants should be treated under 33F) (emphasis added). The critical difference between Article 581-33A(2) and Article 581-33F(2) is that an aider or abettor is liable under Article 581-33F(2) only if he acts with intent to defraud or reckless

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Plaintiffs have still not adequately alleged that any statements made by Mr. Skilling had a material effect on the price of any Enron securities. *See supra.*

[145] Plaintiffs' conclusory claim that the relevant notes were "acquired ... from" Mr. Skilling cannot overcome the burden to demonstrate actual privity. This allegation fails to state how Mr. Skilling's actions resulted in Plaintiffs' ***purchases***. A "purchase" ***is not*** equivalent to "acquisition," the former being a particular variety of the later under Texas law. *See, e.g.,* TEX. REV. CIV. STAT. ANN. BUSINESS AND COMMERCE CODE §17.45(4) (West 2002) ("'Consumer' means [an entity] who seeks or ***acquires by purchase or lease***, any goods or services...") (emphasis added). Thus, a mere allegation of "acquisition from" is insufficient to allege that Plaintiffs ***bought*** the notes from Mr. Skilling as is required under the plain language of the statute.

disregard for the truth. Plaintiffs, however, have not pled that Mr. Skilling acted with the requisite intent to defraud or with reckless disregard for the truth in connection with their aiding and abetting claim. Instead, plaintiffs plead only that "Defendants Lay, Causey, Buy, Fastow and Skilling, by virtue of their positions as directors and/or senior officers of Enron directly or indirectly controlled Enron and/or other defendants named in this Claim and are liable as a result thereof."[146] Because the plaintiffs have failed to plead the essential element of intent under Article 581-33F(2), their claim for aiding and abetting under the TSA should be dismissed.[147] *See Sage v. Wong*, 720 S.W. 2d 882, 884 (Tex. App. – Fort Worth 1986).

C. BECAUSE PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A FEDERAL SECURITIES LAW CLAIM THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION

As an alternative to the justified dismissal of plaintiffs' TSA claims, this Court may also legitimately decline to exercise supplemental jurisdiction over these claims since plaintiffs have failed to state any federal securities law claims. The dismissal of plaintiffs' claims under the Federal Securities laws, necessitated for reasons set forth *supra*, leaves only the disposition of plaintiffs' claim under the Texas Securities Act. Given, then, that the only remaining issue in the case is governed by state law, without any novel or complex issues involved, this Court can appropriately decline, pursuant to 28 U.S.C. § 1367(c) (2000), to exercise supplemental jurisdiction over the remainder of the case. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1998) (stating that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining

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[146] NCC ¶ 1028.

[147] To the extent Plaintiffs attempt to piggy-back this indispensable claim of intent on their hodge-podge of allegations related to their federal securities laws claims, the Consolidated Complaint still fails miserably in alleging any intent with respect to Mr. Skilling. *See supra*, Section II(A)(2).

state-law claims").

VII. CONCLUSION

For all of the foregoing reasons, Jeffrey K. Skilling's Motion To Dismiss Consolidated Complaint For Failure To State A Cause of Action should be granted.

Date: May 8, 2002

Respectfully Submitted,

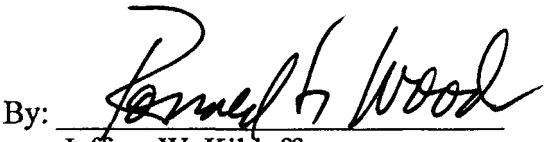
By: 

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EXHIBIT A

EXHIBIT A
Chart of Forward Looking Statements
Protected Under the Safe Harbor Provision

Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
¶215	On or about 3/31/00, Enron issued its 99 Report to Shareholders. This report was reviewed and approved by Vinson & Elkins, Andersen and all the Enron Defendants then with Enron. Enron's 99 Annual Report contained a letter signed by Lay and Skilling, which stated: ***... The market for bandwidth intermediation will grow from $30 billion in 2000 to $95 billion in 2004. ...***	Enron's 1999 Annual Report, (SEC J.A. Tab 11, at p. 38) ("Information Regarding Forward-Looking Statements") and Enron's 1999 10-K, (SEC J.A. Tab 7, at p. 51-52) (cited by reference in Annual Report): "This Annual Report includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. All statements other than statements of historical facts contained in this document are forward-looking statements. Forward-looking statements include, but are not limited to, statements relating to ... demand in the market for broadband services and high bandwidth applications ... Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include ...the ability to penetrate the broadband services market...."
¶224	On 4/12/00, Enron held a conference call for analysts and investors to discuss Enron's 1stQ 00 results and its business. On 4/13/00, Enron executives Lay, Skilling, Koenig, Causey and Fastow also appeared at the Enron Analyst Meeting in Houston. During the conference call – and in follow-up conversations with analysts and in a formal presentation and break-out sessions at the analyst conference – they stated: • ***...Enron was forecasting 00 and 01 EPS of $1.37 and $1.56+.***	Enron's 1Q 00 Earnings Release, (Ex. D Tab 1, at p. 3) (referred to in 1Q 00 Earnings Conference Call, (Ex. D Tab 2) ("Earlier today we reported our first-quarter 2000 results. We hope you have seen the release.")): "This press release includes forward looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, further development of Enron's broadband services network and customer contracting activity, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

*Certain statements referenced herein are attributed to Mr. Skilling in the Consolidated Complaint based solely upon his alleged attendance at conferences, participation in conference calls, or meetings with analysts. In many such instances, plaintiffs' claims fail to identify specific statements attributable to Mr. Skilling and are therefore improperly group pled. Nevertheless, for purposes of this motion only, we list and assume these statements are attributable to Mr. Skilling. Even assuming the statements as pled were made by Mr. Skilling, they are protected as a matter of law.

**The referenced statements are sufficient to invoke the protection of the safe harbor, but are not intended to be exclusive or all-encompassing. To the extent safe harbor protection applies to statements not listed herein, Mr. Skilling reserves his right to invoke such protection.

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Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
¶247	On 7/24/00, Enron executives Skilling, Koenig and Fastow held a conference call for analysts and investors to discuss Enron's 2ndQ 00 results and its business. On 7/25-26/00, Enron executives Skilling, Koenig and Fastow also appeared at Enron's analyst conferences in New York and Boston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the conferences, they stated: • ***...Enron would provide all the wholesale connectivity and deliver content to last mile providers at 1.5 megabit per second, greatly exceeding the standard broadband speeds. Enron would receive a fee for each movie delivered. The potential long-term contract value or revenues over the life of the contract were expected to exceed well over $1 billion.... • Enron was forecasting 01 and 02 EPS of $1.40+ and $1.69+.***	Enron's 2Q 00 Earnings Release, (Ex. D Tab 3, at p. 3) (referred to in 2Q 00 Earnings Conference Call, (Ex. D Tab 4) ("Earlier today we reported our second quarter 2000 results, and we hope you've seen the release.")): "This press release includes forward looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, further development of Enron's broadband services network and customer contracting activity, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."
¶263	On 10/17/00... Skilling, Koenig, Causey, Frevert and Fastow stated: • ***In bandwidth intermediation ...[i]t also had over 10 additional transaction requests, subject to just getting some agreements in place.*** • ***Enron was deploying a first phase of its entertainment on demand product for Blockbuster's movie content. This agreement was one of the largest ever signed and represented enormous long-term value. Well over a billion dollars in revenues....*** • ***A great quarter for Enron. Enron was very excited about its performance and remained comfortable with full year earnings expectations of about a $1.40. ...***	Enron's 3Q 00 Earnings Release, (Ex. D Tab 5, at p. 4) (referred to in 3Q 00 Earnings Conference Call, (Ex. D Tab 6) ("Earlier today we reported our third quarter 2000 results. We hope you've seen the release.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

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¶¶271, 272	... In order to support Enron's stock price, Skilling assured the markets that ... Enron was on track to achieve or exceed its forecasted levels of results .... On 11/24/00, Enron issued a release saying: Enron Corp. President and COO Jeff Skilling stated today that rumors of a potential profit warning are not true. ***"... we are very comfortable with consensus analyst earnings estimates of $0.35 per share in the fourth quarter of 2000, and $1.65 for the full year 2001***," said Skilling.	Enron Press Release, 11/24/00, (Ex. D Tab 7, at p. 1): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forwards-looking statements herein are enumerated in Enron's Form 10-K and 10-Q as filed with the Securities and Exchange Commission." Enron's 99 10-K, (SEC J.A. Tab 7), at pp. 51-52 ("Information Regarding Forward Looking Statements"); Enron's 1Q 00 10-Q, (SEC J.A. Tab 12), at pp. 21-22 ("Information Regarding Forward Looking Statements"); Enron's 2Q 00 10-Q, (SEC J.A. Tab 13), at pp. 26-27 ("Information Regarding Forward Looking Statements"); Enron's 3Q 00 10-Q, (SEC J.A. Tab 14, at p. 30 ("Information Regarding Forward Looking Statements").
¶282	On 1/21/01, Enron held a conference call for analysts and investors to discuss Enron's 00 results and its business. On 1/25/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow appeared at the Enron Annual Investors Conference in Houston. During the conference call – and in follow-up conversations with analysts and formal presentations and break-out sessions at the Investors Conference – they stated: • ***...Enron stock was worth at least $126 per share. Enron was forecasting 01 EPS of $1.70-$1.80 with further growth in 02 to $2.10-$2.20.***	Enron's 4Q 00 Earnings Release, (Ex. D Tab 8, at p. 5) (referred to in 4Q 00 Earnings Conference Call, (Ex. D Tab 9) ("Earlier today we reported our fourth quarter and full year 2000 results. We hope you've had a chance to the release.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

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continued

Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
¶293	In early 3/01, Enron issued its Annual Report to Shareholders, which report was reviewed and approved by Vinson & Elkins, Andersen and all the Enron Defendants then with the Company. The 00 Annual Report contained a letter from Lay and Skilling stating: ***...At a minimum, we see our market opportunities company-wide tripling over the next five years.*** ***Enron is laser-focused on earnings per share, and we expect to continue strong earnings performance.*** Enron Energy Services ***.... In 2001 we expect to close approximately $30 billion in new total contract value***	Enron's 2000 Annual Report, (SEC J.A. Tab 16, at p. 29) ("Information Regarding Forward-Looking Statements") and Enron's 1999 10-K, (SEC J.A. Tab 7, at pp. 46-47) (cited by reference in Annual Report): "This Annual Report includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. All statements other than statements of historical facts contained in this document are forward-looking Statements. Forward-looking statements include, but are not limited to, statements relating to expansion opportunities for the Transportation Services, extension of Enron's business model to new markets and industries, demand in the market for broadband services and high bandwidth applications, transaction volumes in the U.S. power market, commencement of commercial operations of new Power Plants and Pipeline projects, completion of the sale of certain assets and growth in the demand for retail energy outsourcing solutions. When used in this document, the words "anticipate," "believe," "estimate," "project," "plan," "should," "expects," "intend," "may" and similar expressions are intended to be among the statements that identify forward-looking statements. Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include success in marketing natural gas and power to wholesale customers; the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; the timing, extent and market effects of deregulation of energy markets in the United States, including the current energy market conditions in California, and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; political developments in foreign countries; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates, the extent of success [continued]

*Certain statements referenced herein are attributed to Mr. Skilling in the Consolidated Complaint based solely upon his alleged attendance at conferences, participation in conference calls, or meetings with analysts. In many such instances, plaintiffs' claims fail to identify specific statements attributable to Mr. Skilling and are therefore improperly group pled. Nevertheless, for purposes of this motion only, we list and assume these statements are attributable to Mr. Skilling Even assuming the statements as pled were made by Mr. Skilling, they are protected as a matter of law.

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EXHIBIT A
Chart of Forward Looking Statements
Protected Under the Safe Harbor Provision
continued

Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
		[continued from previous page] in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain the credit ratings for its unsecured senior long-term debt obligations."
¶317	On 4/17/01, Enron held a conference call for analysts and investors to discuss Enron's 1stQ 01 results and its business. On 4/18/01, Enron executives Skilling, Koenig, Rice, Causey and Fastow also appeared at Enron's Analyst Conference in New York City. In the conference call and in follow up conversations with analysts and in formal presentations and break-out sessions at the conference, they stated: • ... ***Enron expected to secure premium content directly from content owners....*** • ***Enron was increasing its earnings forecasts for the year 01 to a range of $1.75 to $1.80 per share with 15+% growth in EPS in 02.***	Enron's 1Q 01 Earnings Release, (Master J.A. Tab 12, at p. 4) (referred to in 1Q 01 Earnings Conference Call, (Ex. D Tab 10) ("Earlier today we reported our first quarter results.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; the timing, extent and market effects of deregulation of energy markets in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

*Certain statements referenced herein are attributed to Mr. Skilling in the Consolidated Complaint based solely upon his alleged attendance at conferences, participation in conference calls, or meetings with analysts. In many such instances, plaintiffs' claims fail to identify specific statements attributable to Mr. Skilling and are therefore improperly group pled. Nevertheless, for purposes of this motion only, we list and assume these statements are attributable to Mr. Skilling. Even assuming the statements as pled were made by Mr. Skilling, they are protected as a matter of law.

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EXHIBIT A
Chart of Forward Looking Statements
Protected Under the Safe Harbor Provision
continued

Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
¶328	On 7/12/01, Enron reported ***better-than-expected*** 2ndQ 01 results: ... "***... our asset-light approach will allow us to adjust quickly to weak broadband industry conditions. ...***" said Skilling. ...	Enron's 2Q 01 Earnings Release, (Ex. D Tab 11, at p. 5) (referred to in 2Q 01 Earnings Conference Call, (Master J.A. Tab 38) ("Earlier today we reported our second quarter results.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; the timing, extent and market effects of deregulation of energy markets in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."
¶329	On 7/12/01, Enron held a conference call for analysts and investors to discuss Enron's 2ndQ 01 results and its business. On 7/25-27/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow also appeared at Enron Analyst Conferences in New York City and Boston. During the conference calls and in follow-up conversations with analysts and in formal presentations and break-out sessions at the conferences, they stated: • ***...Enron had confidence in achieving EPS for the full year 01 of $1.80 and $2.15 per share for 02. ...*** • ***... Enron was firmly on track to achieve its 01 target of $225 million of IBIT in its retail business. ...*** • ***... Enron's focus [in Broadband] going forward would be in the intermediation area.*** [continued]	Enron's 2Q 01 Earnings Release, (Ex. D Tab 11, at p. 5) (referred to in 2Q 01 Earnings Conference Call, (Master J.A. Tab 38) ("Earlier today we reported our second quarter results.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; the timing, extent and market effects of deregulation of energy markets in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

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EXHIBIT A
Chart of Forward Looking Statements
Protected Under the Safe Harbor Provision
continued

Source of Allegation	Forward Looking Statements as Alleged in Consolidated Complaint*	Examples of Applicable Safe Harbor Warnings Made Contemporaneously or in Same Document**
	[continued from previous page] • ***...Enron's projected EPS for 01 was $1.80 – a 22% increase on the prior year. Enron expected EPS to be continuing to grow at that kind of rate.*** • ***The earnings guidance Enron was giving was that it believed that 22% this year looks very good and it could continue that kind of growth rate next year. ...*** • ***... Over time, Enron's stock price would come back.*** • ***... Enron provided the guidance for next year at $2.15. Enron believed in a 20% kind of growth rate and was very comfortable with it. ...***	
¶337	On 7/25/01, *Bloomberg News* reported on Enron's Analyst Conference in New York: ***ENRON'S SKILLING VOWS TO MEET OR BEAT PROFIT PROJECTIONS*** Enron Corp. will meet or beat its profit projections this year and next, Chief Executive Jeffrey Skilling said, criticizing analysts who've recently lowered their forecasts for the largest energy trader. Enron said July 12 that it expects to make $1.80 a share this year and $2.15 in 2002. "***We will hit those numbers, and we will beat those numbers***," Skilling told a meeting of analysts and investors in New York. ***The refusal of a state government in India to pay $64 million in power bills is not going to hurt Enron's earnings, Skilling said.*** "***In India, we have government guarantees on the performance of our contract," Skilling said. "We're convinced we'll be paid in full" for the $875 million the company has invested so far, plus unpaid power bills.***	Enron's 2Q 01 Earnings Release, (Ex. D Tab 11, at p. 5) (referred to in 2Q 01 Earnings Conference Call, (Master J.A. Tab 38) ("Earlier today we reported our second quarter results.")): "This press release includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, the timing, extent and market effects of deregulation of energy markets in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements."

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EXHIBIT B

EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶119	On 10/13/98, Enron held a conference call for analysts and investors to discuss Enron's 3rdQ 98 results and its business. During the call, Skilling, Koenig, Causey and Fastow stated: • ... ***EES would be profitable by the 4thQ 99. ...***	***Public Filings:*** **Enron's 4/21/98 S-3**, (SEC J.A. Tab 37): ***Forward Looking Statements Disclaimer*** "Although Enron believes its expectations reflected in such forward looking statements are based on reasonable assumptions, no assurance can be given that such expectations will prove to have been correct. Important factors that could cause actual results to differ materially from the expectations reflected in the forward looking statements herein include political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets in the United States and Europe, other actions taken by regulatory authorities, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, interest rates and foreign currencies... All subsequent written or oral forward looking statements attributable to Enron or persons acting on its behalf are expressly qualified in their entirety by the foregoing cautionary statements." (at p. 4) **Enron's 97 10-K**, (SEC J.A. Tab 2): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include ... ***the ability to penetrate new retail natural gas and electricity markets in the United States and Europe***...." (at p. 53). **Enron's 1Q 98 10-Q & 2Q 98 10-Q**, (SEC J.A. Tab 3, 4): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include ... ***the ability to penetrate new retail natural gas and electricity markets in the United States and Europe, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity and interest rates***...." (1Q 98 10-Q, at p. 20, 2Q 98 10-Q, at p. 32).

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶145	On 4/13/99, Enron held a conference call for analysts and investors to discuss Enron's business. During the call, Lay, Skilling, Koenig and Causey stated: ***... EES was on track for at least $8 billion of new contracts during 99. ...*** ***... EES was on track to be earnings positive in the 4thQ 99. ...***	***In addition to the following disclosures, see above, disclosures relevant to ¶119.*** ***Public Filings:*** **Enron's 3Q 98 10-Q**, (SEC J.A. Tab 5): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries; ***the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates***...." (emphasis added) (at p. 37). **Enron's 98 10-K**, (SEC J.A. Tab 6): ***Risks Associated with Customer Retention*** "Retention of existing customers and potential growth of Enron's customer base will depend, in part, upon the ability of Enron to respond to new customer expectations and changing economic and regulatory conditions." (at pp. 19-20). ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially fromthose in the forward looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates...." (at pp. 63-64) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] **Enron's 2/3/99 S-3/A**, (SEC J.A. Tab 46): ***Forward Looking Statements Disclaimer*** "Although we believe our expectations reflected in the forward-looking statements are based on reasonable assumptions, no assurance can be given that these expectations will prove to have been correct. Important factors that could cause actual results to differ materially from the expectations reflected in the forward-looking statements include, among other things: ... the ability to penetrate new retail natural gas and electricity markets in the United States and in foreign jurisdictions, the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions, other regulatory developments in the United States and in foreign countries, including tax legislation and regulations, the extent of efforts by governments to privatize natural gas and electric utilities and other industries, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currencies and interest rates.... (2/3/99 at 5, 4/5/99 at 3) **Enron's 3/18/99 8-K**, (SEC J.A. Tab 75): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates...." (at p. 5) ***Analyst Reports Cited in Complaint:*** **1/13/99 Deutsche Bank report**, (Ex. D Tab 13) (NCC ¶127): "Because of its businesses, including that of price risk management services, Enron could be exposed to more market risk than the average energy company. Enron manages market risk on a portfolio basis, subject to parameters established by its Board of Directors, and an independent risk control group ensures compliance with stated risk management policies. With its use of financial instruments, the company could be exposed to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates."

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶179	On 10/12/99, Enron held a conference call for analysts and investors to discuss Enron's 3rdQ 99 results and its business. On 10/13/99, Enron executives Skilling, Koenig, Causey and Fastow also appeared at Enron's quarterly analyst conference in Houston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analyst conference, they stated: • ***...Enron remained firmly on track for a profitable 4thQ in the retail business*** ...	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145.*** ***Public Filings:*** **Enron's 1Q 99 10-Q & 2Q 99 10-Q**, (SEC J.A. Tab 7, 8). ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries, the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates...." (1Q 99 10-Q, at p. 25 & 2Q 99 10-Q, at p. 28) ***Press Releases Cited in Complaint:*** **Enron's 2Q 99 & 3Q 99 Earnings Releases**, (Ex. D Tab 14, 15) (NCC ¶¶ 156 & 177): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets in the United States and Europe, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity and interest rates...." (2Q 99, at p. 4 & 3Q 99, at pp. 3 – 4) ***Analyst Reports Cited in Complaint:*** **10/12/99 Bank of America report**, (Ex. D Tab 16) (NCC ¶182): "[There was] a reduction in overall volumes ... in 3Q99. Enron's North American power business was primarily responsible for the reduction as ENE pared back its exposure to severe power price volatility during the quarter."

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶197	On 1/18/00, Enron held a conference call for analysts and investors to discuss Enron's 99 results and its business. On 1/20/99 [*sic*], Enron executives Skilling, Koenig, Causey and Fastow also appeared at the Enron Analyst Conference in Houston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analyst conference, they stated: ***... Enron was forecasting strong profits for the full year 00. ...***	***In addition to the following disclosures, see above, disclosures relevant to ¶119, 145, 179.*** ***Public Filings:*** **Enron's 98 10-K**, (SEC J.A. Tab 6): ***Risks Associated with EOG*** (at pp. 6, 30) *For example:* "... All of EOG's oil and gas activities are subject to the risks normally incident to the exploration for and development and production of natural gas and crude oil, including blowouts, cratering and fires, each of which could result in damage to life and property. Offshore operations are subject to usual marine perils, including hurricanes and other adverse weather conditions, and governmental regulations as well as interruption or termination by governmental authorities based on environmental and other considerations. In accordance with customary industry practices, insurance is maintained by EOG against some, but not all, of the risks. ***Losses and liabilities arising from such events could reduce revenues and increase costs to EOG to the extent not covered by insurance.*** ...." (emphasis added) ***Risks Associated with the Interstate Transmission of Natural Gas*** (at pp. 7-10). *For example:* "Northern competes with other interstate pipelines in the transportation and storage of natural gas. In addition, the FERC continues its efforts to introduce more competition into the natural gas industry, having the effect of increasing transportation and purchase options of Northern's traditional customer base." ***Risks Associated with PGE*** (at pp. 11-12). ***Risks Associated with Houston Pipeline*** (at p. 13). ***Risks Associated with International Development*** (at p. 15). *For example*: "Enron's energy infrastructure projects are, to varying degrees, subject to all the risks associated with project development, construction and financing in foreign countries, including without limitation, the receipt of permits and consents, the availability of project financing on acceptable terms, expropriation of assets, ***renegotiation of contracts with foreign governments and political instability***, as well as changes in laws and policies governing operations of foreign-based businesses generally." (emphasis added) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Risks Associated with Customer Retention*** (at pp. 19-20). "Retention of existing customers and potential growth of Enron's customer base will depend, in part, upon the ability of Enron to respond to new customer expectations and changing economic and regulatory conditions." ***Risks Associated with Wholesale*** (at pp. 46-49). *For example*: "Earnings from Enron Wholesale are dependent on the origination and completion of transactions, some of which are individually significant and which are impacted by market conditions, the regulatory environment and customer relationships. . . . ***External factors, such as the amount of volatility in market prices, impact the earnings opportunity associated with Enron Wholesale's business. Risk related to these activities is managed using naturally offsetting transactions and hedge transactions. The effectiveness of Enron's risk management activities can have a material impact on future earnings.***" (at p. 49) (emphasis added). ***Risks Associated with Governmental Regulation*** (at pp. 19-26). ***Risks Associated with Legal Proceedings and Other Contingencies*** (at pp. 34-37; 101-103). ***Risks Associated with Accounting Changes*** (at pp. 58, 82). ***Risks Associated with Capital Expenditures*** (at p. 60). ***Risks Associated with Dilution and Credit Rating Risk*** (at pp. 60-61). *For example*: "Enron is a party to certain financial contracts which contain provisions for early settlement in the event of a significant market price decline in which Enron's common stock falls below certain levels (prices ranging from $15.48 to $28.00 per share) or if the credit ratings for Enron's unsecured, senior long-term debt obligations fall below investment grade. The impact of this early settlement could include the issuance of additional shares of Enron common stock." (at p. 60) ***Risks Associated with Merchant Assets*** (at pp. 61, 87) [continued]

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Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Risks Associated with Financial Risk Management*** (at pp. 61-63, 84-86). *For example*: "***Management of the market risks associated with its portfolio of transactions is critical to the success of Enron.*** ... The use of financial instruments by Enron's businesses may expose Enron to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates." (at p. 61-62). **Enron's 1Q 99 10-Q, 2Q 99 10-Q, & 3Q 99 10-Q**, J.A. (SEC) (Tabs 7, 8, 9). ***Risks Associated with Wholesale and Price Risk Management*** (1Q 99 10-Q, at pp. 24 – 25; 2Q 99 10-Q, at p. 28; 3Q 99 10-Q, at p. 27). ***Risks Associated with Accounting Changes*** (1Q 99 10-Q, at p. 24; 2Q 99 10-Q at p. 27; 3Q 99 10-Q, at p. 26). ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets in the United States and Europe; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of EOG's success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline, water and other infrastructure projects; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; Enron's success in implementing its Year 2000 Plan, the effectiveness of Enron's Year 2000 Plan and the Year 2000 readiness of Outside Entities; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward looking statements, which will depend on general market conditions and Enron's ability to maintain or increase the credit ratings for its unsecured senior long-term debt obligations." (1Q 99 10-Q, at p. 25; 2Q 99 10-Q, at p. 28; 3Q 99 10-Q, at p. 27) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Press Releases Cited in Complaint:*** **Enron's 1Q 99, 2Q 99, 3Q 99, & 4Q 99 Earnings Releases**, Ex. D (Tabs 13, 14, 17) (NCC ¶¶ 144, 156, 177, 215 – 222): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets in the United States and Europe, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." ***Analyst Reports Cited in Complaint:*** **6/9/99 JP Morgan report**, (Master J.A. Tab 21) (NCC ¶153): "Trading Poses a Perennial Risk." (at p. 4) "Enron structures financial products and uses 'mark to market' accounting. This limits the comparability of financial statements, as a project's bottom-line effect is bound only by ECT's financial engineering skills." (at p. 5). **11/26/99 JP Morgan report**, (Ex. D Tab 18) (NCC ¶190): "Just over the past few months there was speculation of a crisis at Enron India ... and most recently of Enron Energy Services losing money and facing deteriorating margins." (at p. 2).

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Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶202	On 1/19/00, *The Wall Street Journal* reported: ***... Mr. Skilling expects profit from retail energy services to rise "significantly" from a projected $50 million for 2000....***	***See above, disclosures relevant to ¶¶119, 145, 179, 197.***
¶215	On or about 3/31/00, Enron issued its 99 Report to Shareholders. This report was reviewed and approved by Vinson & Elkins, Andersen and all the Enron Defendants then with Enron. Enron's 99 Annual Report contained a letter signed by Lay and Skilling, which stated: ***... The market for bandwidth intermediation will grow from $30 billion in 2000 to $95 billion in 2004.*** ...	***Public Filings:*** **Enron's 99 10-K**, (SEC J.A. Tab 10): ***Risks Associated with Broadband*** "Development of bandwidth as a commodity will be dependent, among other things, on the ability of the industry to develop and measure quality of service benchmarks and connectivity of networks of market participants to facilitate processing of contracted services. ***There can be no assurance that such a market will develop.***" (emphasis added) (at p. 10). ***Forward Looking Statements Disclaimer*** "Forward-looking statements include, but are not limited to, statements relating to ... ***demand in the market for broadband services and high bandwidth applications*** ... Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. ***Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include ...the ability to penetrate the broadband services market....***" (emphasis added) (at pp. 51-52). ***Analyst Reports Cited in Complaint:*** **1/6/00 CIBC report**, (Master J.A. Tab 25) (NCC ¶ 194): "Of course, the ultimate value of the [Enron broadband] business will depend on execution." (at p. 5). [continued]

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		[continued from previous page] **1/18/00 CIBC report**, (Master J.A. Tab 26) (NCC ¶199): "[I]t is still unclear how industry-leading [Enron's broadband] technology is or, importantly, whether it will allow ENE to help set standards in this arena...." (at p. 8). "We await further details ... and emphasize that much remains to be proven in the marketplace." (at p. 8). **1/24/00 Merrill Lynch report**, (Ex. D Tab 19) (NCC ¶209): "We do, however, see a couple of formidable barriers to entry to Enron's [broadband] strategy. The primary one is Enron's expertise in mastering commodity markets. The concept of commoditizing bandwidth is difficult for many telecomm companies to grasp, given the variety of different bandwidth needs and applications." (at p. 3). **2/9/00 JP Morgan report**, (Master J.A. Tab 27) (NCC ¶211) "The challenge before EBS is to create a transparent and anonymous marketplace.... EBS, as a network owner, needs to be extra careful not to cross subsidize the trading operation through the physical network and vice versa. This would not only create internal inefficiency, but also undermine the trust and transparency necessary to build this market." (at p. 5). "Corporate commitments for capacity are notoriously inefficient." (at p. 5). "EBS must remain cognizant of alienating the networks, as that would significantly increase the effort necessary to create liquidity and scale." (at p. 5). "Market inefficiencies persist from misallocation of risk, higher capital costs, potential overbuilding, and unnecessary commodity volatility." (at p. 6).
¶224	On 4/12/00 [and] 4/13/00, Enron executives Lay, Skilling, Koenig, Causey and Fastow ...stated: • ***...Enron was forecasting 00 and 01 EPS of $1.37 and $1.56+.***	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215.*** ***Public Filings:*** **Enron's 99 10-K**, (SEC J.A. Tab 10): ***Risks Associated with the Interstate Transmission of Natural Gas*** (at pp. 4 – 6). ***Risks Associated with PGE*** (at p. 7). [continued]

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Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Risks Associated with Wholesale*** (at pp. 8 – 9, 43). *For example*: "Earnings from Enron Wholesale are dependent on the origination and completion of transactions, some of which are individually significant and which are impacted by market conditions, the regulatory environment and customer relationships. ... ***In addition, significant earnings are expected from Enron Wholesale's commodity portfolio and investments, which are subject to market fluctuations. External factors, such as the amount of volatility in market prices, impact the earnings opportunity associated with Enron Wholesale's business.*** ...." (at p. 43) (emphasis added). ***Risks Associated with Houston Pipeline*** (at p. 10). ***Risks Associated with International Development*** (at p. 11). ***Risks Associated with Customer Retention*** (at p. 17). ***Risks Associated with Governmental Regulation*** (at pp. 16 – 22). ***Risks Associated with Legal Proceedings and Other Contingencies*** (at pp. 29 – 33; 91 – 93). ***Risks Associated with Capital Expenditures*** (at pp. 48). ***Risks Associated with Dilution and Credit Rating Risk*** (at p. 49). ***Risks Associated with Financial Risk Management:*** (at pp. 49-51, 73-75). *For example:* "The use of financial instruments by Enron's businesses may expose Enron to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates. ... The use of financial instruments by Enron's businesses may expose Enron to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates. For Enron Wholesale's and Energy Services' businesses, the major market risks [include] ... Commodity Price Risk ... Interest Rate Risk ... Foreign Currency Exchange Rate Risk ... Equity Risk." (at p. 49-50) ***Risks Associated with Accounting Changes*** (at p. 95). [continued]

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Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and Europe; the ability to penetrate the broadband services market; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; the effectiveness of Enron's Year 2000 Plan and the Year 2000 readiness of outside entities; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain or increase the credit ratings for its unsecured senior long-term debt obligations." (at pp. 51 – 52). ***Press Releases Cited in Complaint:*** **Enron's 1Q 00 Earnings Release**, (Ex. D Tab 1) (NCC ¶223): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, further development of Enron's broadband services network and customer contracting activity, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." (at p. 3). [continued]

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		[continued from previous page] ***Press Articles Cited in Complaint:*** **4/12/00 Bloomberg News report**, (Ex. D Tab 20) (NCC ¶225): "Profit from Enron's communications business will be damped by the unit's spending, which is forecast to reach $600 million this year...." (at p. 2). ***See also Houston Chronicle article, below, relevant to NCC at ¶228.***
¶228	On 4/13/00, *The Houston Chronicle* reported on Enron's recent favorable results: ... ***"We believe these new levels are sustainable and that they more than likely will accelerate***," Jeff Skilling, Enron president, said in a conference call with reporters.	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224.*** ***Press Articles Cited in Complaint:*** **4/13/00 Houston Chronicle article**, (Ex. D Tab 21) (NCC ¶228): "Enron plans to spend $650 million this year on its communications business, Skilling said, and the division is expected to lose $60 million to $65 million for the full year. It's too early to predict when Enron's broadband services group might turn a profit...." (at 2).
¶247	On 7/24/00, Enron executives Skilling, Koenig and Fastow ... stated: • ***...Enron would provide all the wholesale connectivity and deliver content to last mile providers at 1.5 megabit per second, greatly exceeding the standard*** [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228.*** ***Public Filings:*** **Enron's 1Q 00 10-Q**, (SEC J.A. Tab 12) : ***Risks Associated with Financial Risk Management*** "For a complete discussion of the types of financial risk management products used by Enron, the types of market risks associated with Enron's portfolio of transactions, and the methods used by Enron to manage market risks, see Enron's Annual [continued]

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	[continued from previous page] ***broadband speeds. Enron would receive a fee for each movie delivered. The potential long-term contract value or revenues over the life of the contract were expected to exceed well over $1 billion....*** ***• Enron was forecasting 01 and 02 EPS of $1.40+ and $1.69+.***	[continued from previous page] Report on Form 10-K for the year ended December 31, 1999. Enron's value at risk for trading commodity price risk increased to $32 million at March 31, 2000 as compared to $21 million at December 31, 1999. This increase is attributable to increased natural gas prices, combined with increased price volatility in the power markets in anticipation of the peak summer season. In addition, value at risk for trading securities, which primarily relate to Enron's merchant investments, increased to $32 million at March 31, 2000, compared to $26 million at December 31, 1999. This increase is a result of increased values of existing investments as well as new investments and increased volatility attributable to the communications-related merchant investments." (at p. 21) ***Forward Looking Statements Disclaimer*** "Forward-looking statements include, but are not limited to, statements relating to expansion opportunities for the Gas Pipeline Group, ***demand in the market for broadband services and high bandwidth applications, transaction volumes in the U.S. power market,*** commencement of commercial operations of new power plants and pipeline projects, and growth in the demand for retail energy outsourcing solutions. When used in this document, the words "anticipate," "believe," "estimate," "except," "intend," "may," "project," "plan," "should" and similar expressions are intended to be among the statements that identify forward-looking statements. Although Enron believes that its expectations reflected in these forward- looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and Europe; the ability to penetrate the broadband services market; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain or increase the credit ratings for its unsecured senior long-term debt obligations." (at pp. 21 – 22) [continued]

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		[continued from previous page] ***Press Releases Cited in Complaint:*** **Enron's 2Q 00 Earnings Release**, Ex F (Tab 3) (NCC ¶246): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, ***further development of Enron's broadband services network and customer contracting activity,*** and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." (at p. 3) (emphasis added). ***Analyst Reports Cited in Complaint:*** **7/24/00 Merrill Lynch report**, (Ex. D Tab 22) (NCC ¶250): "As a reminder, Enron has been growing its exposure to Internet/telecom, thus we expect the stock to trade with much greater volatility than it has historically. Risks are related to weather, interest rates, energy commodity prices, regulatory issues and new business startups." (2)
¶263	On 10/17/00, ... Skilling, Koenig, Causey, Frevert and Fastow stated: • ***In bandwidth intermediation ...[i]t also had over 10 additional transaction requests, subject to just getting some agreements in place.*** • ***Enron was deploying a first*** [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247.*** ***Public Filings:*** **Enron's 2Q 00 10-Q**, (SEC J.A. Tab 13) : ***Risks Associated with Financial Risk Management*** "For a complete discussion of the types of financial risk management products used by Enron, the types of market risks associated with Enron's portfolio of transactions, and the methods used by Enron to manage market risks, see Enron's Annual Report on Form 10-K for the year ended December 31, 1999. Enron's value at risk for trading commodity price risk increased to $53 million at June 30, 2000 as compared to $21 million at December 31, 1999. This increase is attributable to increased [continued]

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	[continued from previous page] ***phase of its entertainment on demand product for Blockbuster's movie content. This agreement was one of the largest ever signed and represented enormous long-term value. Well over a billion dollars in revenues....*** ***• ... Enron was very excited about its performance and remained comfortable with full year earnings expectations of about a $1.40. ...***	[continued from previous page] natural gas prices, combined with increased price volatility in the power and gas markets related to the peak summer season. In addition, value at risk for non-trading foreign currency exchange rate risk increased to $10 million at June 30, 2000, compared to $4 million at December 31, 1999. This increase is a result of contracts to hedge currency translation risks associated with Yen-denominated notes issued by Enron during 2000." (at p. 27) ***Forward Looking Statements Disclaimer*** "Forward-looking statements include, but are not limited to, statements relating to expansion opportunities for the Gas Pipeline Group, ***demand in the market for broadband services and high bandwidth applications, transaction volumes in the U.S. power market***, commencement of commercial operations of new power plants and pipeline projects, and growth in the demand for retail energy outsourcing solutions. When used in this document, the words "anticipate," "believe," "estimate," "except," "intend," "may," "project," "plan," "should" and similar expressions are intended to be among the statements that identify forward-looking statements. Although Enron believes that its expectations reflected in these forward- looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include political developments in foreign countries; the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and Europe; the ability to penetrate the broadband services market; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain or increase the credit ratings for its unsecured senior long-term debt obligations." (at pp. 27 – 28) [continued]

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		[continued from previous page] ***Press Releases Cited in Complaint:*** **Enron's 3Q 00 Earnings Release**, Ex F (Tab 5) (NCC ¶262): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, further development of Enron's broadband services network and customer contracting activity, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." ***Analyst Reports Cited in Complaint:*** **7/25/00 Merrill Lynch report**, (Ex. D Tab 23) (NCC ¶250): "Offsetting the dramatic rise in CSS, however, was the decline in Wholesale's second component, Energy Assets & Investments, which posted $55 million in IBIT compared to $325 million last year. The decline was due to both lower performance from its $1.5 billion energy merchant portfolio as well as the absence of any material asset sales in the quarter. ... Going forward, we continue to expect 30%-35% annual IBIT growth in Wholesale. Although this will remain contingent on the continuing shift of the domestic utility power market to non-regulated sales, the development of Europe will play an increasingly larger role as well, likely becoming material in 2001." (at p. 2) **7/25/00 & 10/17/00 Merrill Lynch reports**, (Ex. D Tab 23, 24) (NCC ¶¶250, 266): "As a reminder, Enron has been growing its exposure to Internet/telecom, thus we expect the stock to trade with much greater volatility than it has historically. Risks are related to weather, interest rates, energy commodity prices, regulatory issues and new business startups." (at p. 2) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] **9/15/00 Deutsche Bank report**, (Ex. D Tab 25) (NCC ¶257): "Investment Negatives: Price risk management services could expose ENE to more market risk than the average energy company. With its use of financial instruments, ENE could be exposed to market and credit risks resulting from adverse changes in commodity and equity prices." (2)"The IBIT attributable to assets and investments declined in the quarter to $55 million due to a significant decrease in sales of interests in power projects and a decline in the value of the merchant investments." (at p. 17) "RISKS. Because of its businesses, including that of price risk management services, Enron could be exposed to more market risk than the average energy company. Enron manages market risk on a portfolio basis, subject to parameters established by its board of directors, and an independent risk control group ensures compliance with stated risk management policies. With its use of financial instruments, the company could be exposed to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates, and foreign exchange rates." (at p. 18).

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶264	On 10/17/00, Skilling was interviewed on CNNfn and stated: ... SKILLING: ***No. I think that's a very real possibility, and in fact, we've designed our business to take advantage of that.... And we see some of the same characteristics in the broadband business, which is why we've begun building the capability to transact real-time bandwidth, so that when the market prices do decline - and I believe they'll decline pretty significantly – we'll be in a position to make that lower-cost capacity available to our customers.***	***See above, disclosures relevant to ¶¶215, 224, 228, 247, 263.***
¶¶271, 272	... In order to support Enron's stock price, Skilling assured the markets that ... Enron was on track to achieve or exceed its forecasted levels of results .... [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263.*** ***Public Filings:*** **Enron's 3Q 00 10-Q**, (SEC J.A. Tab 14): ***Risks Associated with Financial Risk Management*** "For a complete discussion of the types of financial risk management products used by Enron, the types of market risks associated with Enron's portfolio of transactions, and the methods used by Enron to manage market risks, see Enron's Annual Report on Form 10-K for the year ended December 31, 1999. Enron's value at risk for trading commodity price risk increased [continued]

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EXHIBIT B
Chart of Forward Looking Statements
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continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
	[continued from previous page] On 11/24/00, Enron issued a release saying: Enron Corp. President and COO Jeff Skilling stated today that rumors of a potential profit warning are not true. ***"... we are very comfortable with consensus analyst earnings estimates of $0.35 per share in the fourth quarter of 2000, and $1.65 for the full year 2001,"*** said Skilling.	[continued from previous page] to $55 million at September 30, 2000 as compared to $21 million at December 31, 1999. This increase is attributable to increased natural gas prices, combined with increased price volatility in the power and gas markets related to overall market conditions. In addition, value at risk for non-trading foreign currency exchange rate risk increased to $10 million at September 30, 2000, compared to $4 million at December 31, 1999. This increase is a result of contracts to hedge currency translation risks associated with Yen-denominated notes issued by Enron during 2000. Enron's value at risk for trading equity risk was $31 million at September 30, 2000. Equity trading market relates to Enron's merchant assets and investments and risk certain derivative instruments associated with merchant activities." (at p. 29) ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include political developments in foreign countries, the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and Europe; the ability to penetrate the broadband services market; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain or increase the credit ratings for its unsecured senior long-term debt obligations." (at p. 30) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Press Releases Cited in Complaint:*** **Enron Press Release, 11/24/00**, (Ex. D Tab 7) (NCC ¶272): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forwards-looking statements herein are enumerated in Enron's Form 10-K and 10-Q as filed with the Securities and Exchange Commission." ***Analyst Reports Cited in Complaint:*** **10/18/00 CitiGroup report**, (Master J.A. Tab 31) (NCC ¶267): Rated Enron as "Buy, High Risk" "ENE has shifted its business portfolio towards trading and marketing of commodities – a business with more risk than regulated gas transmission and electric distribution."
¶282	On 1/21/01 [and] 1/25/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow ... stated: • ***...Enron stock was worth at least $126 per share. Enron was forecasting 01 EPS of $1.70-$1.80 with further growth in 02 to $2.10-$2.20.***	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272.*** ***Press Releases Cited in Complaint:*** **Enron's 4Q 00 Earnings Release**, (Ex. D Tab 8) (NCC ¶281): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." (at p. 5) [continued]

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EXHIBIT B
Chart of Forward Looking Statements
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continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Press Articles Cited in Complaint:*** **1/9/01 Dow Jones Energy Service article**, (Master J.A. Tab 3) (NCC ¶279): "Enron India's managing director, K. Wade Cline, said last Saturday that international arbitration [over payments related to Dabhol Power Corp.] was 'a real possibility.'" "A spokesman for Enron India told Dow Jones Newswires ... 'We continue to evaluate all the options available to address this issue, but at this moment, it would be premature to speculate on this further.'" "Speculation in the media has been rife as to whether lenders may stop disbursing funds for Phase 2 of the Dabhol power project, given the dispute surrounding Phase 1 between the MSEB and DPC."
¶283	On 1/22/01, Skilling appeared on CNNfn, was interviewed and stated: ...When asked about the performance of Enron stock, Skilling replied: Well, we were up, 1998, we were up, I think, about 50 percent. Nineteen ninety-nine we were up about 60 percent. And last year we were up 88 percent total return to shareholders. ***So we've had a long run of very, very strong performance for our shareholders. So I think they can expect the same as time goes on.***	***See above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282.***

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Chart of Forward Looking Statements
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continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶293	In early 3/01 … The 00 Annual Report contained a letter from Lay and Skilling stating: ***…At a minimum, we see our market opportunities company-wide tripling over the next five years.*** ***Enron is laser-focused on earnings per share, and we expect to continue strong earnings performance.*** Enron Energy Services ***…. In 2001 we expect to close approximately $30 billion in new total contract value*** …..	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282.*** ***Public Filings:*** **Enron's 00 10-K**, (SEC J.A. Tab 15): (*see also,* **Enron's 2/27/01 8-K**, (SEC J.A. Tab 23), for substantially similar disclosures). ***Risks Associated with the Interstate Transmission of Natural Gas*** (at pp. 4-6). *For example*: "Florida Gas is the only interstate natural gas pipeline serving peninsular Florida. Florida Gas faces competition from residual fuel oil in the Florida market. In addition, there are two proposed pipeline projects currently on file with the FERC that would compete with Florida Gas to serve Florida's growing energy needs. Both projects propose building a pipeline from Mobile, Alabama crossing the Gulf of Mexico to Florida. Enron is unable to predict which of these projects, if any, will go forward." ***Risks Associated with PGE*** (at p. 7). ***Risks Associated with Wholesale*** (at pp. 8-9, 24) *For example*: "Earnings from Enron Wholesale are dependent on the origination and completion of transactions, some of which are individually significant and which are impacted by market conditions, the regulatory environment and customer relationships. … In addition, significant earnings are expected from Enron Wholesale's commodity portfolio and investments, which are subject to market fluctuations. ***External factors, such as the amount of volatility in market prices, impact the earnings opportunity associated with Enron Wholesale's business. Risk related to these activities is managed using naturally offsetting transactions and hedge transactions. The effectiveness of Enron's risk management activities can have a material impact on future earnings.*** See "Financial Risk Management" for a discussion of market risk related to Enron Wholesale." (at p. 24) (emphasis added). ***Risks Associated with International Development*** (at pp. 10, 16). ***Risks Associated with Broadband.*** "Development of bandwidth and other related products as commodities will be dependent, among other things, on the ability of the industry to develop and measure quality of service benchmarks and connectivity of networks of market participants to facilitate processing of contracted services. There can be no assurance that such a market will develop." (at p. 14). [continued]

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Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Risks Associated with Customer Retention*** (at p. 15). ***Risks Associated with Governmental Regulation*** (at pp. 15-20; 88-89). ***Risks Associated with Legal Proceedings and Other Contingencies*** (at pp. 25-27; 89-90). ***Risks Associated with Accounting Changes*** (at pp. 40-41). ***Risks Associated with Capital Expenditures*** (at p. 43). ***Risks Associated with Dilution and Credit Rating Risk*** (at p. 49) *For example*: "Enron is a party to certain financial contracts which contain provisions for early settlement in the event of a significant market price decline in which Enron's common stock falls below certain levels (prices ranging from $15.48 to $28.00 per share) or if the credit ratings for Enron's unsecured, senior long-term debt obligations fall below investment grade. The impact of this early settlement could include the issuance of additional shares of Enron common stock." (at p. 49) ***Risks Associated with Financial Risk Management:*** (at pp 44-46). *For example*: "The use of financial instruments by Enron's businesses may expose Enron to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates. ... The use of financial instruments by Enron's businesses may expose Enron to market and credit risks resulting from adverse changes in commodity and equity prices, interest rates and foreign exchange rates. For Enron Wholesale's and Energy Services' businesses, the major market risks [include] Commodity Price Risk ... Interest Rate Risk ... Foreign Currency Exchange Rate Risk ... Equity Risk:" (at p. 44-45). "In 2000, increased natural gas prices combined with increased price volatility in power and gas markets ***caused Enron's value at risk to increase significantly***." (at p. 46) (emphasis added). ***Forward Looking Statements Disclaimer*** "All statements other than statements of historical facts contained in this document are forward-looking Statements. Forward-looking statements include, but are not limited to, statements relating to expansion opportunities for the Transportation [continued]

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continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] Services, extension of Enron's business model to new markets and industries, demand in the market for broadband services and high bandwidth applications, transaction volumes in the U.S. power market, commencement of commercial operations of new Power Plants and Pipeline projects, completion of the sale of certain assets and ***growth in the demand for retail energy outsourcing solutions. When used in this document, the words "anticipate," "believe," "estimate," "project," "plan," "should," "expects," "intend," "may" and similar expressions are intended to be among the statements that identify forward-looking statements.*** Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include success in marketing natural gas and power to wholesale customers; the ability of Enron to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; the timing, extent and market effects of deregulation of energy markets in the United States, including the current energy market conditions in California, and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; political developments in foreign countries; the extent of efforts by governments to privatize natural gas and electric utilities and other industries; the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currency and interest rates; the extent of success in acquiring oil and gas properties and in discovering, developing, producing and marketing reserves; the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects; the effectiveness of Enron's risk management activities; the ability of counterparties to financial risk management instruments and other contracts with Enron to meet their financial commitments to Enron; and Enron's ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and Enron's ability to maintain the credit ratings for its unsecured senior long-term debt obligations." (emphasis added). (at pp. 46 – 47)

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Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶309	On 3/23/01 ... Skilling, Rice, Causey, Koenig and Fastow stated: • ***... Enron was highly confident in its target for the year of $225 million of income and $30 billion of new originated contracts...***	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293.*** ***Press Releases Cited in Complaint:*** **Enron's 3/23/01 Press Release**, (Ex. D Tab 26) (NCC ¶309): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." (at p. 3).
¶317	On 4/17/01 [and] 4/18/01, Enron executives Skilling, Koenig, Rice, Causey and Fastow ... stated. • ***... Enron expected to secure premium content directly from content owners....*** • ***Enron was increasing its earnings forecasts for the year 01 to a range of $1.75 to $1.80 per share with 15+% growth in EPS in 02.***	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309.*** ***Press Releases Cited in Complaint:*** **Enron's 1Q 01 Earnings Release**, (Master J.A. Tab 12) (NCC ¶317): ***Risks Associated with PGE*** "Portland General reported first quarter IBIT of $60 million compared to $105 million last year. Reduced earnings in 2001 reflect higher power costs, reduced investment income and the impacts of certain regulatory events " (at p. 3) ***Risks Associated with Accounting Changes*** "Enron follows mark-to-market accounting for its price risk management activities. The new rules require certain derivative instruments that are not included in Enron's price risk management activities to be recorded at fair value." (at p. 4) [continued]

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		[continued from previous page] ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe; the timing, extent and market effects of deregulation of energy markets in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; and conditions of the capital markets and equity markets during the periods covered by the forward looking statements." (at p. 4)
¶318	On 4/17/01, Skilling appeared on CNNfn, was interviewed and stated: [W]e ... said to investors, as long ago as December ... that we felt very comfortable with the $1.70 to $1.75 number for this year.... [W]e're raising that from $1.75 to $1.80....	***See above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309, 317.***
¶328	On 7/12/01, Enron reported ***better-than-expected*** 2ndQ 01 results: ... "... ***our asset-light approach will allow us to adjust quickly to weak broadband industry conditions.*** ..." said Skilling. ...	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309, 317.*** ***Public Filings:*** **Enron's 00 10-K**, (SEC J.A. Tab 15): ***Risks Associated with Broadband*** "Development of bandwidth and other related products as commodities will be dependent, among other things, on the ability of the industry to develop and measure quality of service benchmarks and connectivity of networks of market participants to facilitate processing of contracted services. There can be no assurance that such a market will develop." (at p. 14). [continued]

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		[continued from previous page] ***Forward Looking Statements Disclaimer*** "Forward-looking statements include, but are not limited to, statements relating to ... extension of Enron's business model to new markets and industries, demand in the market for broadband services and high bandwidth applications.... Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include ... development of Enron's broadband network and customer demand for intermediation and content services...." (at p. 29) **Enron's 1Q 00 10-Q**, (SEC J.A. Tab 12): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include ... development of Enron's broadband network and customer demand for intermediation and content services...." (at p. 17) **Enron's 6/1/01 S-3**, (SEC J.A. Tab 65): ***Forward Looking Statements Disclaimer*** "Although we believe our expectations reflected in the forward-looking statements are based on reasonable assumptions, no assurance can be given that these expectations will prove to have been correct. Important factors that could cause actual results to differ materially from the expectations reflected in the forward-looking statements include, among others: ... development of Enron's broadband network and customer demand for intermediation and content services ... We undertake no obligation to update or revise our forward-looking statements, whether as a result of new information, future events or otherwise. In light of these risks, uncertainties and assumptions, the forward-looking events discussed herein might not occur." (at p. 4). [continued]

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continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
		[continued from previous page] ***Press Releases Cited in Complaint:*** **Enron's 2Q 01 Earnings Release**, (Ex. D Tab 11) (NCC ¶328): ***Risks Associated with Broadband*** "We are significantly reducing our broadband cost structure to match the reduced revenue opportunities currently available." (at p. 1) "Broadband Services: Enron Broadband Services reported a $102 million IBIT loss for the second quarter compared to a loss of $8 million in the same period a year ago. This quarter's loss reflects significantly lower revenues and comparable operating expenses from a year ago. Enron expects to significantly modify the cost structure of its broadband business in the near-term to reduce future losses associated with a lower revenue outlook." (at p. 4) ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include ... development of Enron's broadband network and customer demand for intermediation and content services...." (at p. 5)
¶330	On 7/12/01, *Bloomberg News* ran a story about Enron's Dabhol Power Plant stating: ENRON'S CEO SAYS WORST IS OVER IN INDIAN POWER UNIT DISPUTE Enron Corp. Chief Executive Jeffrey Skilling said he thinks the worst is over in the dispute between Enron's Dabhol Power Co. utility and [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309, 317, 328.*** ***Public Filings:*** **Enron's 00 10-K**, (SEC J.A. Tab 15): ***Risks Associated with International Development*** (at pp. 10, 16). "Enron's energy infrastructure projects are, to varying degrees, subject to all the risks associated with project development, construction and financing in foreign countries, including without limitation, the receipt of permits and consents, the availability of project financing on acceptable terms, expropriation of assets, ***renegotiation of contracts with foreign governments and political instability***, as well as changes in laws and policies governing operations of foreign-based businesses generally." (emphasis added) [continued]

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**The referenced statements are sufficient to invoke the protection of the safe harbor, but are not intended to be exclusive or all-encompassing. To the extent cautionary language protection applies to statements not listed herein, Mr. Skilling reserves his right to invoke such protection.

EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
	[continued from previous page] its sole customer, an arm of the Indian state of Maharashtra. "***I think we're past the high-water mark***," Skilling said in an interview following the release of the company's second-quarter earnings. "***There will continue to be noise, but I think the contracts are very clear. They have very strong provisions, so they will be enforced.***" ***Enron has "zero intention of taking any economic loss on the project," he said. "Zero."***	[continued from previous page] "Enron's international operations are subject to the jurisdiction of numerous governmental agencies in the countries in which its projects are located, with respect to environmental and other regulatory matters. ***Generally, many of the countries in which Enron does and will do business have recently developed or are in the process of developing new regulatory and legal structures to accommodate private and foreign-owned businesses. These regulatory and legal structures and their interpretation and application by administrative agencies are relatively new and sometimes limited.*** Many detailed rules and procedures are yet to be issued. The interpretation of existing rules can also be expected to evolve over time. Although Enron believes that its operations are in compliance in all material respects with all applicable environmental laws and regulations in the applicable foreign jurisdictions, Enron also believes that the operations of its projects eventually may be required to meet standards that are comparable in many respects to those in effect in the United States and in countries within the European Community. In addition, as Enron acquires additional projects in various countries, it will be affected by the environmental and other regulatory restrictions of such countries." (emphasis added) **Enron's 1Q 00 10-Q**, (SEC J.A. Tab 12): ***Forward Looking Statements Disclaimer*** "Although Enron believes that its expectations reflected in these forward-looking statements are based on reasonable assumptions, such statements involve risks and uncertainties and no assurance can be given that actual results will be consistent with these forward-looking statements. Important factors that could cause actual results to differ materially from those in the forward-looking statements herein include success in marketing natural gas and power to wholesale customers; ... the timing, extent and market effects of deregulation of energy markets in the United States, including the current energy market [conditions in California, and in foreign jurisdictions; other regulatory developments in the United States and in foreign countries, including tax legislation and regulations; political developments in foreign countries; the extent of efforts by governments to privatize natural gas and electric utilities and other industries... the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects...." (at p. 17)

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
¶329	On 7/12/01, [and] 7/25-27/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow ... stated: • ***...Enron had confidence in achieving EPS for the full year 01 of $1.80 and $2.15 per share for 02. ...*** • ***... Enron was firmly on track to achieve its 01 target of $225 million of IBIT in its retail business*** • ***... Enron's focus [in Broadband] going forward would be in the intermediation area.*** • ***...Enron's projected EPS for 01 was $1.80 – a 22% increase on the prior year. Enron expected EPS to be continuing to grow at that kind of rate.*** • ***The earnings guidance Enron was giving was that it believed that 22% this year looks very good and it could continue that kind of growth rate next year. ...*** [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309, 317, 328.*** ***Public Filings:*** **Enron's 6/1/01 S-3**, (SEC J.A. Tab 65): ***Forward Looking Statements Disclaimer*** "Although we believe our expectations reflected in the forward-looking statements are based on reasonable assumptions, no assurance can be given that these expectations will prove to have been correct. Important factors that could cause actual results to differ materially from the expectations reflected in the forward-looking statements include, among others: success in marketing natural gas and power to wholesale customers; the ability to penetrate new retail natural gas and electricity markets (including energy outsourcing markets) in the United States and in foreign jurisdictions; development of Enron's broadband network and customer demand for intermediation and content services; the timing and extent of deregulation of energy markets in the United States and in foreign jurisdictions, other regulatory developments in the United States and in foreign countries, including tax legislation and regulations, political developments in other countries, the extent of efforts by governments to privatize natural gas and electric utilities and other industries, the timing and extent of changes in commodity prices for crude oil, natural gas, electricity, foreign currencies and interest rates, the timing and success of efforts to develop international power, pipeline and other infrastructure projects, the ability of counterparties to financial risk management instruments and other contracts with us to meet their financial commitments to us, the effectiveness of our risk management activities, the extent of success in acquiring oil and gas properties and discovering, developing, producing and marketing reserves, and our ability to access the capital markets and equity markets during the periods covered by the forward-looking statements, which will depend on general market conditions and our ability to maintain or increase the credit ratings for our unsecured senior long-term debt obligations. We undertake no obligation to update or revise our forward-looking statements, whether as a result of new information, future events or otherwise. In light of these risks, uncertainties and assumptions, the forward-looking events discussed herein might not occur." (at p. 4).

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
	[continued from previous page] • ***... Over time, Enron's stock price would come back.*** • ***... Enron provided the guidance for next year at $2.15. Enron believed in a 20% kind of growth rate and was very comfortable with it.*** ...	
¶337	On 7/25/01, *Bloomberg News* reported on Enron's Analyst Conference: ...Enron Corp. will meet or beat its profit projections this year and next, Chief Executive Jeffrey Skilling said, criticizing analysts who've recently lowered their forecasts for the largest energy trader. Enron said July 12 that it expects to make $1.80 a share this year and $2.15 in 2002. "***We will hit those numbers, and we will beat those numbers***," Skilling told a meeting of analysts and investors in New York. [continued]	***In addition to the following disclosures, see above, disclosures relevant to ¶¶119, 145, 179, 197, 215, 224, 228, 247, 263, 271, 272, 282, 293, 309, 317, 328.*** ***Press Articles Cited in Complaint:*** **7/25/01 Bloomberg News article**, (Master J.A. Tab 7) (NCC ¶337): "[California] has threatened to sue if power sellers don't agree to $8.9 billion in refunds."

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EXHIBIT B
Chart of Forward Looking Statements
Protected Under the Bespeaks Caution Doctrine
continued

Source of Allegation	Forward Looking Statements as Alleged*	Examples of Applicable Cautionary Language Available to Market At Time Statement Was Made**
	[continued from previous page] ***The refusal of a state government in India to pay $64 million in power bills is not going to hurt Enron's earnings, Skilling said. "In India, we have government guarantees on the performance of our contract," Skilling said. "We're convinced we'll be paid in full" for the $875 million the company has invested so far, plus unpaid power bills.***	

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EXHIBIT C

EXHIBIT C
Chart of Other Statements

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶119	On 10/13/98, Enron held a conference call for analysts and investors to discuss Enron's 3rdQ 98 results and its business. During the call, Skilling, Koenig, Causey and Fastow stated: • ***Enron's news was extremely good. Enron had another excellent quarter.*** • ***Everything was going great with Enron. On a very positive note ... its hedges in the investment portfolio performed extremely well even in uncertain financial markets.... Really good news in the finance and investing component. Enron could not state how strong the wholesale business was.*** • ***Enron had a great quarter in the wholesale business. Enron was setting up for a great fourth quarter and a great 99 in the wholesale business.*** • ***Throughout 98, Enron's management disciplines were effective. This clearly differentiates Enron from its competitors.*** • ***Enron made significant strides in building both the skills and execution capabilities of EES, its new retail business. EES is very well positioned to capitalize on the unique opportunity in the retail commodity and services market. ... Enron was poised for long-term success in this business. Everything was on track in retail energy services. EES was looking very, very strong.*** • ***EES also continued to significantly expand its contracting activities. It was a very, very strong quarter for EES. ...*** • ***Enron just had a great, great quarter in this segment. Over all, the third quarter was a very strong quarter for Enron. Strong earnings, very clean earnings for the quarter and Enron was feeling really good about how the year is coming and how 99 is setting up.***
¶129	On 1/19/99, Skilling was interviewed by *Bloomberg*. He stated: "***[W]e had a really a strong year. ... Real strong quarter in wholesale....***"
¶145	On 4/13/99, Enron held a conference call for analysts and investors to discuss Enron's business. During the call, Lay, Skilling, Koenig and Causey stated: • ***Enron was very pleased with its 1stQ results reflecting the continued strength of our worldwide energy operations which Enron expected to continue through 99.*** Enron had a very good quarter across the Company. • ***All four of Enron's main businesses experienced significant growth and were all significantly profitable. Commodity sales and services put in a stunning performance and all of the indications are that that sort of performance will continue.*** • ***Enron was on track in its pipeline of new projects. They were coming along exactly as expected, Enron was going great on that side of the business. A good quarter for EES. ...*** • ***Enron was very confident that with contracts at late stages of negotiation it was in good shape for announcing a number of very large national contracts in 99. ...*** • ***Enron was very pleased with the results for the 1stQ. Enron had established a continuing strong track record of growth. ...***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶157	On 7/13/99, Enron held a conference call for analysts and investors to discuss Enron's 2ndQ 99 results and its business. On 7/14-16/99, Enron executives Skilling, Sutton, Koenig and Causey also appeared at Enron's 2ndQ analyst meetings in New York, Boston and Houston In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analyst meetings, they stated. • ***Enron had a great quarter. Enron was hitting on all eight cylinders. Enron was very pleased with these results for the quarter and very optimistic about the outlook for the future. Enron was very optimistic about how the business was playing out.*** • ***Overall, Enron's businesses had been performing well. Enron was well positioned for significant continued growth.***
¶160	On 7/14/99, *The Houston Chronicle* reported: These lines of business are some of the fastest-growing segments of Enron's business, said Jeffrey Skilling, Enron's president. ***"It is growing very fast and it will continue to show strong growth,"*** Skilling said. The wholesale energy operations and services group includes the company's expanding communications business, which Skilling sees as one of the best growth opportunities among Enron's various divisions. ***"To date, we have just gotten our toes in the water, but we really like what we see in this business,"*** Skilling said.
¶167	On 9/2/99, CS First Boston issued a report on Enron, rating Enron a ***"Buy,"*** forecasting 00 EPS of $1.35 for Enron and stating: ***... Skilling's enthusiasm for the potential of ENE Communications as a whole and bandwidth trading specifically could not be contained***
¶175	On 10/1/99, *CFO Magazine* ran an article on Enron stating: ... "Fastow's expert balancing act, in fact, ***has earned him the 1999 CFO Excellence Award for Capital Structure Managemen***t" ... says Jeffrey K. Skilling, Enron president and chief operating officer. "[Fastow] deserves every accolade tossed his way."
¶178	On 10/12/99, *Bloomberg* reported: ***"A lot of projects are going cash-flow positive in India, Turkey and South America,"*** Skilling said. ***Specifically, Skilling credited power plants in India and Turkey, and a gas pipeline that runs from Bolivia to Brazil, with adding to cash flow.***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶179	On 10/12/99, Enron held a conference call for analysts and investors to discuss Enron's 3rdQ 99 results and its business. On 10/13/99, Enron executives Skilling, Koenig, Causey and Fastow also appeared at Enron's quarterly analyst conference in Houston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analyst conference, they stated: • ***Enron had a very strong third quarter.*** • ***Enron's wholesale business continued to evidence the tremendous competitive advantages that are the major factor in Enron consistently achieving strong earnings growth. Enron continued to be very confident in the prospects for its wholesale businesses. Enron's new communications business was pursuing a business plan modeled after its successful wholesale energy networks. Enron was rapidly developing a presence in major global markets and making large fibre investments. Enron expected this business to continue solid progress.*** • ***The 3rdQ results Enron announced were reflective of the strong earnings power and the momentum at Enron.*** • ***Wholesale business was very, very strong and had a good quarter. All the fundamentals in that business were looking very positive.*** • ***In terms of contracting activity, EES's contract activity was also very successful in the 3rdQ.*** • ***Enron was very pleased with its 3rdQ results. Enron remained convinced that it had developed unique network businesses and would continue to gain market share and grow profitability.*** • ***Enron had strong production coming from India.*** • ***Enron was very optimistic about bandwidth trading. The more Enron saw of that market, it was absolutely ripe for opening to competitive markets. Investors would start seeing those showing up in the first and second quarters of next year.***
¶184	On 10/13/99, Deutsche Bank issued a report on Enron. It rated Enron a ***"Buy"*** and forecast 00 EPS of $1.35 and a 14% three-year EPS growth rate for Enron. It also stated: ... This morning, Enron management held one of their traditional quarterly meetings in New York. ...***Jeff Skilling was enthusiastic about the Indian market. Despite political chest thumping in India, he suggested that Enron is in very solid political stead in India. ...***
¶191	On 11/30/99, CS First Boston issued a report on Enron. It forecast 00 EPS of $1.35 and a 15% five-year EPS growth rate for Enron. It also stated: .... We recently spoke with COO Jeff Skilling regarding the business condition. ***Mr. Skilling articulated that business across all lines is in excellent shape***.... Our conversation with Mr. Skilling ... suggested ***that momentum in the retail business continues to accelerate. ... Mr. Skilling also added that he believes Enron's telecommunications business has substantial upside potential both on an earnings and valuation basis relative to market expectations and/or his view of what's in the stock***....

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶192	On 12/2/99, Enron issued a release stating: **Enron Communications Announces First Commodi ty Bandwidth Trade** Enron Communications, Inc., a wholly owned subsidiary of Enron Corp., a leader in the delivery of high-bandwidth application services, ***announced today the first forward trade of bandwidth.*** ***"This is 'Day One' of a potentially enormous market,"*** said Jeff Skilling, Enron president and chief operating officer....
¶197	On 1/18/00, Enron held a conference call for analysts and investors to discuss Enron's 99 results and its business. On 1/20/99 [*sic*], Enron executives Skilling, Koenig, Causey and Fastow also appeared at the Enron Analyst Conference in Houston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the analyst conference, they stated: ***• Enron had a tremendous year in 1999. Its wholesale energy business led the strong financial results continuing high levels of both profitability and growth. A great year for the wholesale business. Enron's retail energy services business had a watershed year. It turned profitable on schedule in the 4thQ this year and more than doubled new outsource contracts during the year. A great quarter.*** ***• In addition, Enron laid the foundation for its new broadband services business which played directly to Enron's fundamental strengths and capabilities.*** ***• EES had captured the leading position in the energy outsource market and was extremely well positioned for rapid growth moving forward. Enron was forecasting strong profits for the full year 00.*** ***• In summary, Enron was very pleased with the 4thQ and full year financial results. Enron was also very excited about the continuing positive business developments in the Company.*** ***• Enron was well positioned now in the telecommunications business to continue increasing its large share of these markets. Enron had the technology, products, services and market knowledge to further enhance these network businesses and was confident that its strong performance would continue increasing profitability and expanding returns to shareholders. Just a great year for Enron and Enron was looking forward to a replay of a great year in the year 00.*** ***• 00 would result in: • Continued strong growth in the core WEOS business. • Break-out performance from EES. • Rapid development of EBS.***
¶202	On 1/19/00, *The Wall Street Journal* reported: *... **Enron President Jeffrey Skilling said fixed costs of $170 million a year were hard to overcome during the past three years, but "we've crossed that line now and this business will be a big factor for us in the future."*** Mr. Skilling said ***Enron marketers brought in business contracts valued at $8.5 billion during 1999 ... generating significant income for the company. Mr. Skilling expects profit from retail energy services to rise "significantly" from a projected $50 million for 2000.... "As we look to 2000, we see momentum building in every one of our businesses,"*** Mr. Skilling said.

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶213	On 2/28/00, CS First Boston issued a report on Enron. It forecast 00 EPS of $1.35 and a 15% five-year EPS growth rate for Enron. It also stated: Meeting with Enron President and COO, Jeffrey Skilling reaffirms Broadband potential and values We recently met with Enron President and COO Jeffrey Skilling .... ***Mr. Skilling indicated the market reception to ENE's unique video streaming services continues to be outstanding.*** ...
¶215	On or about 3/31/00, Enron issued its 99 Report to Shareholders. This report was reviewed and approved by Vinson & Elkins, Andersen and all the Enron Defendants then with Enron. Enron's 99 Annual Report contained a letter signed by Lay and Skilling, which stated: ***In 1999 we witnessed an acceleration of Enron's staggering pace of commercial innovation .... We reported another round of impressive financial and operating results.....*** ***We believe the future will be even more rewarding. We remain the world's leader in wholesale and retail energy services. Our new broadband subsidiary, Enron Broadband Services, is redefining Internet performance by designing and supplying a full range of premium broadband delivery services.... We believe that our broad networks will give us unbeatable scale and scope in every business in every region in which we operate.*** ENRON BROADBAND SERVICES ***Enron Broadband Services is off to a tremendous start: we own and operate a superior intelligent fiber optic network that is focused on delivering bandwidth-intensive content, such as TV-quality video, over the Internet.... We are establishing benchmark bandwidth contracts and making a market in bandwidth. ... With our head start, we expect to become the leader in this field.*** Enron Energy Services In 1999 we proved that Enron's retail business works. ... ***Our persistence in the retail energy market has given us an unassailable competitive advantage.***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶224	On 4/12/00, Enron held a conference call for analysts and investors to discuss Enron's 1stQ 00 results and its business. On 4/13/00, Enron executives Lay, Skilling, Koenig, Causey and Fastow also appeared at the Enron Analyst Meeting in Houston. During the conference call – and in follow-up conversations with analysts and in a formal presentation and break-out sessions at the analyst conference – they stated: • ***... In addition to these record financial results, Enron had a record quarter for both wholesale volumes and retail contracting.*** • ***Enron experienced tremendous success with its new e-commerce platform that was called Enron Online, and in its newest business, EBS, Enron made significant advancements in the deployment of its network and in contracting with new customers.*** • ***The quarter's strong performance was attributable to increased earnings from Enron's portfolio of energy related and other investments. This was a good quarter for Enron's energy related investment business. ...*** • ***In addition, worldwide asset operations further contributed to strong results, including Enron's India energy networks. ...*** • ***For Enron's wholesale business – just a great, great quarter. Overall wholesale statistics were really, really strong. Enron had seen a significant increase in its activity levels and Enron expected that to be sustainable and to grow in the future.*** • ***Enron's retail energy business was now firmly established and Enron had an unassailable competitive advantage there. In the 1stQ, Enron again witnessed the strong operating leverage of this business. Very successful contracting has resulted in a significant revenue increase. That coupled with a stable cost structure led to a very high operating leverage and profits continued to escalate.*** • ***The strong financial results are attributable to a very significant scale that Enron had achieved in the U.S. and a continued shift in our contract mix, to longer term outsourced contracts. So, a great quarter for the retail business, too.*** • ***Broadband services – during the first quarter, Enron significantly advanced the development of its network. It closed numerous important transactions and reported progress against every operating metric set forth earlier this year. A great quarter.*** • ***Enron was very pleased with its first quarter results. Enron was excited about the continuing positive business developments across all of Enron for 00. Enron's 1stQ earnings confirmed the strength of its operations and the excellent momentum it had in its high growth businesses. Enron had established networks worldwide to provide continued strong performance and expansion opportunities for all of its businesses.*** • ***A great quarter for Enron. Enron looked forward to further growth in earnings and an increased market cap in the future. ...***
¶228	On 4/13/00, *The Houston Chronicle* reported on Enron's recent favorable results: ... ***"We believe these new levels are sustainable and that they more than likely will accelerate,"*** Jeff Skilling, Enron president, said in a conference call with reporters.

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶232	On 4/14/00, Deutsche Bank issued reports on Enron. The reports rated Enron a ***"Buy," raised*** its price target to $96 and ***increased*** Enron's forecasted 00 and 01 EPS to $1.37 and $1.60 and its three-year EPS growth rate to 16% for Enron. The reports also stated: ... Yesterday afternoon, Enron management held its traditional Q1 meeting in New York. ***Jeff Skilling presented another impressive picture of Enron's growth prospects in domestic energy markets, international ... markets, and the developing communications segment. The wholesale segment continues to produce amazingly strong earnings results and is gaining market share....***
¶247	On 7/24/00, Enron executives Skilling, Koenig and Fastow held a conference call for analysts and investors to discuss Enron's 2ndQ 00 results and its business. On 7/25-26/00, Enron executives Skilling, Koenig and Fastow also appeared at Enron's analyst conferences in New York and Boston. In the conference call and in follow-up conversations with analysts and in formal presentations and break-out sessions at the conferences, they stated: • ***Enron had another outstanding quarter in each of its business units and continued to be very excited about the developments across the Company. This quarter's results clearly demonstrated Enron's leading market positions in wholesale energy marketing, retail energy services and in broadband services....*** • ***Enron's wholesale energy business was large, extremely well established and global. Its earnings growth had been very consistent and was sustainable.*** • ***The whole commodity side of Enron's business was just stunning during the quarter. It reflected an incredibly strong market position.*** • ***At the wholesale level, Enron had just a tremendous quarter. Enron felt very good about it, very positive and was optimistic about the outlook for the future. Enron's market position had never been better.*** • ***EES continued to move forward right on track. Enron's ability to provide comprehensive energy outsourcing on a national scale continued to be a key competitive advantage. Profitability continued to escalate and Enron's very rapid growth in contracting resulted in a significant revenue increase. ...*** • ***During the quarter Enron made enormous advances in executing agreements with new broadband distribution partners. ...*** • ***The bandwidth trading component was in operation. Broadband intermediation was ahead of where Enron expected it to be. There was a lot of interest in this. The counterparties were quickly growing and Enron was seeing very, very strong growth that, frankly, surprised it. Enron was very bullish on the growth in the intermediation side of this business and was ahead of where it expected to be.*** • ***The recently announced agreement between Enron and Blockbuster evidenced what Enron believed was a fundament shift. ...*** • ***Enron was pleased with another very strong quarter. Enron's established networks worldwide, together with its unique strategy and broad capabilities, would provide for continued strong performance and increased shareholder value.*** • ***Skilling had been with the Company in one form or another for 18 years and he had never seen the Company in better shape. Enron's core markets moved from strength to strength. Enron had very, very good growth opportunities across the board and they were really excited about the prospects for the future.*** • ***Enron felt extremely good about its ability to sustain the performance that it had posted in the wholesale business over the last ten years. That was likely to continue.*** • ***Enron had a great quarter and was very, very pleased by what it was seeing in the marketplace and the performance of all of its businesses....***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶263	On 10/17/00, Enron held a conference call for analysts and investors to discuss Enron's 3rdQ 00 results and its business and its prospects. During the call, and in the follow-up conversations with analysts, Skilling, Koenig, Causey, Frevert and Fastow stated: • ***Enron had another excellent quarter across the Company. ...*** • ***... Enron had consistently increased year-over-year quarterly earnings in this business. A total of 19 consecutive quarters, or almost five years, and this was just due to the very, very strong franchise position Enron had in virtually all of the markets where it participated in the wholesale business.*** ... • ***EES had really been running at a breakout pace this year. ...*** • ***Blockbuster was going fine. The major news was that all the major technology components were in place and Enron was actively working to put that transaction in place in four major markets.*** • ***A great quarter for Enron. Enron was very excited about its performance ... Good quarter, good outlook for the year. The Company was well positioned in the markets.***
¶264	On 10/17/00, Skilling was interviewed on CNNfn and stated: CHERNOFF: Jeff, Let's talk about the Broadband aspect, because as you say, the market is certainly giving you a lot of credit for that. But at the same time, over the past few weeks, there's been a debate on Wall Street as to whether we might actually be entering a broadband glut. Is that a fantasy? SKILLING: ***No. I think that's a very real possibility, and in fact, we've designed our business to take advantage of that.... And we see some of the same characteristics in the broadband business, which is why we've begun building the capability to transact real-time bandwidth, so that when the market prices do decline - and I believe they'll decline pretty significantly – we'll be in a position to make that lower-cost capacity available to our customers.***
¶271	... In order to support Enron's stock price, Skilling assured the markets that Enron's business fundamentals were strong and that Enron was on track to achieve or exceed its forecasted levels of results ....
¶272	On 11/24/00, Enron issued a release saying: Enron Corp. President and COO Jeff Skilling stated today that rumors of a potential profit warning are not true. ***"All of our businesses are performing extremely well ...***" said Skilling.
¶274	On 12/13/00, Skilling appeared on CNBC and stated: BARTIROMO: ... ***Why would any investor want to buy your stock right now?*** SKILLING: ... We had a pretty tough week a couple of weeks ago, but have come back very strong. I think the reason investors like Enron is ... ***[w]e have had a very strong growth rate and we expect that to continue.... So growth and strong earnings are why our investors want to buy Enron.***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶282	On 1/21/01, Enron held a conference call for analysts and investors to discuss Enron's 00 results and its business. On 1/25/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow appeared at the Enron Annual Investors Conference in Houston. During the conference call – and in follow-up conversations with analysts and formal presentations and break-out sessions at the Investors Conference – they stated: • ***...For the 4thQ numbers, Enron reported excellent results ....*** • ***Enron had a tremendous year. The strong results reflected what Enron believed was its breakout performance in all of its operations. The results also further demonstrated its leading market position in each of its major businesses.*** • ***Enron's wholesale business led its strong financial results, achieving a record level of profitability. Enron's retail energy services group also had an outstanding year. ....*** • ***Enron's wholesale business – its largest operation – continued to grow at a very, very strong rate. ... Enron built a tremendous market franchise that had significant sustainable competitive advantage.*** • ***The wholesale business had just done great. Enron's wholesale had just a fantastic quarter and a fantastic year and was looking forward to a great 01....*** • ***Enron's other major broadband business was content services. Enron also had a successful 4thQ where it successfully launched the first phase of its content on demand product. ... Enron believed that it had a very unique and powerful commercial proposition with proven technology that created an enormous opportunity in one of the world's fastest growing markets.*** • ***Enron was pleased with its 4thQ and full year results. Enron had just an absolutely outstanding year. And an outstanding quarter. Enron was very excited about the continuing positive business developments across the Company and remained confident that its strong performance would continue increasing profitability and expanding returns to shareholders.*** • ***As Enron looked forward to the year 01, the environment looked great. Enron was feeling very good about things....***
¶283	On 1/22/01, Skilling appeared on CNNfn, was interviewed and stated: ***We had a strong quarter*** .... [I]t was across the board.... It was pretty much everything. When asked about the performance of Enron stock, Skilling replied: ... ***So we've had a long run of very, very strong performance for our shareholders. So I think they can expect the same as time goes on.***
¶286	On 1/31/01, Skilling appeared on NPR, was interviewed and stated: In summary, we had a tremendous year in the year 2000. ***Strong results reflect what we believe is breakout performance in all of our operations. The results also further demonstrate our leading market positions in each of our major businesses.***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶289	On 2/20/01, *Fortune* published an article on Enron, questioning the quality of its reported earnings: *... Skilling ... describes Enron's wholesale business as "very simple to model," and note[s] that the growth in Enron's profitability tracks the growth in its volumes almost perfectly. "People who raise questions are people who have not gone through [our business] in detail and who want to throw rocks at us," says Skilling. ...*
¶293	In early 3/01, Enron issued its Annual Report to Shareholders, which report was reviewed and approved by Vinson & Elkins, Andersen and all the Enron Defendants then with the Company. The 00 Annual Report contained a letter from Lay and Skilling stating: ***Enron's performance in 2000 was a success by any measure .... Enron has built unique and strong businesses that have tremendous opportunities for growth.*** These businesses – wholesale services, retail energy services, broadband services ... can be significantly expanded within their very large existing markets and extended to new markets with enormous growth potential. ... ***Enron is laser-focused on earnings per share, and we expect to continue strong earnings performance.*** Enron Energy Services ***Our retail unit is a tremendous business that experienced a break-out year in 2000. ... Energy and facilities management outsourcing is now a proven concept, and we've established a profitable deal flow ....*** Enron Broadband Services ***We have created a new market for bandwidth intermediation with Enron Broadband Services. ...*** ***Enron also has developed a compelling commercial model to deliver premium content-on-demand services via the Enron Intelligent Network.... ...*** ***Strong Returns*** ***Enron is increasing earnings per share and continuing our strong returns to shareholders. ...*** ***...Our results put us in the top tier of the world's corporations. We have a proven business concept ....*** ***Our talented people ... financial strength ... have created our sustainable and unique businesses.***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶309	On 3/23/01, Enron held a conference call for analysts, money and portfolio managers, institutional investors and large Enron shareholders to discuss Enron's business. During the call – and in follow-up conversations with analysts – Skilling, Rice, Causey, Koenig and Fastow stated: • ... ***Enron's business was in great shape.*** • ***Enron's wholesale business was having an outstanding quarter consistent with the outstanding year it had last year and Enron expected that to continue....*** • ***In Enron's broadband business there had been some rumors out there that it had terminated its intermediation business. That was absolutely not true. Enron was having a great quarter in the intermediation side of the bandwidth business. It was ahead of plan and Enron expected this to be a good business moving forward.*** • ***Enron content services business was still a core area of the business. ... Enron was very optimistic about the outlook for that ...*** • ***EBS was coming along just fine. Enron was committed to it and very, very comfortable with where it stood. Enron's strength in the bandwidth business was predicated on a surplus in supply and fast declining prices are good for Enron. In fact, that is better for Enron as time goes on. So EBS was looking good.*** • ***... It had strong contracts and guarantees and would prevail in India. Enron was very confident of that....*** • ***Enron had a strong balance sheet. Enron was in great shape on the balance sheet.*** • ***Despite a bad stockmarket, Enron was in good shape....***
¶311	In ... late 3/01, Skilling stated to the public in a meeting in New Orleans that the broadband operation was going full speed – "pedal to the metal."
¶316	On 4/17/01, Enron reported ***better-than-expected*** 1stQ 01 results: ... ***"Enron's wholesale business continues to generate outstanding results. Transaction and volume growth are translating into increased profitability," said Jeff Skilling, Enron's president and CEO. "In addition, our retail energy services and broadband intermediation activities are rapidly accelerating."***
¶317	On 4/17/01, Enron held a conference call for analysts and investors to discuss Enron's 1stQ 01 results and its business. On 4/18/01, Enron executives Skilling, Koenig, Rice, Causey and Fastow also appeared at Enron's Analyst Conference in New York City. In the conference call and in follow up conversations with analysts and in formal presentations and break-out sessions at the conference, they stated: • ***For the first quarter of 01, Enron reported outstanding results ... Enron's 1stQ results demonstrated the strength of all of its businesses.*** • ***Wholesale services led Enron's strong performance in the first quarter. ... As for the wholesale business – just an outstanding quarter, another outstanding quarter.*** • ***... In its bandwidth intermediation business, it was making excellent progress in creating a commodity market for bandwidth. ...*** • ***Overall, on the intermediation side, very strong development of the marketplace and the commoditization of bandwidth, and Enron was feeling very good about the development of this business.*** • ***... First quarter results were great. Enron had a great quarter, the Company was doing very well. Each of Enron's major businesses continued to generate high levels of earnings and provided opportunities to extend its business model to new markets.*** • ***Enron was very optimistic about each of its businesses and was confident that its record of growth was sustainable for many years to come. Enron felt very good about the prospects for the future....***

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EXHIBIT C
Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶318	On 4/17/01, Skilling appeared on CNNfn, was interviewed and stated: [W]e ... said to investors, as long ago as December ... that we felt very comfortable with the $1.70 to $1.75 numb er for this year.... [W]e're raising that from $1.75 to $1.80. ***And we feel very comfortable with that number***....
¶328	On 7/12/01, Enron reported ***better-than-expected*** 2ndQ 01 results: ... "***Enron completed another quarter of exceptional performance. Our wholesale and retail energy businesses continue to dramatically expand business activity and increase profitability***...." said Jeff Skilling, Enron president and CEO. "In contrast to our extremely strong energy results, this was a difficult quarter in our broadband business. ***However, our asset-light approach will allow us to adjust quickly to weak broadband industry conditions. We are significantly reducing our broadband cost structure to match the reduced revenue opportunities currently available***," said Skilling. ...
¶329	On 7/12/01, Enron held a conference call for analysts and investors to discuss Enron's 2ndQ 01 results and its business. On 7/25-27/01, Enron executives Skilling, Koenig, Causey, Kean and Fastow also appeared at Enron Analyst Conferences in New York City and Boston. During the conference calls and in follow-up conversations with analysts and in formal presentations and break-out sessions at the conferences, they stated: • ***For the 2ndQ 01, Enron reported outstanding results ... As the numbers show, Enron's energy business fundamentals were excellent.*** • ***... Enron was expressing its confidence, strong confidence in the remainder of this year and next year given the business prospects that it saw on the horizon.*** • ***The EES business was poised to expand rapidly with commensurate increases in profitability. ... So, the retail business had a great, great quarter as well.*** • ***... Industry conditions in the broadband area were very weak. Luckily, Enron's strategy of minimizing the amount of hard assets allowed it to significantly reduce costs to be more in line with the revenue opportunities that were in the industry. ...*** • ***In bandwidth intermediation, Enron was making good progress, continued good progress in creating a market for bandwidth. ...*** • ***Overall, a great quarter. 2ndQ results were outstanding. Business fundamentals remained strong. Enron's new businesses were expanding and adding to its earnings power and Enron was well positioned for future growth.*** • ***... Enron's business was very strong.*** • ***Enron was certainly not signaling any slowdown. Enron expected the kind of strong growth seen from Enron in the past would continue. ... Enron continued to see very strong dynamics and fundamentals for its business and believed that it could perform at that level. ....*** • ***Enron's transactions with LJM during the 2ndQ were only a couple of real minor things related to transactions that had been done earlier. ...*** • ***Enron felt very good about the prospects for the business. ...Enron felt very good about that and giving that guidance.***

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Chart of Other Statements
continued

Source of Allegation	Vague and Optimistic Statements as Alleged in Consolidated Complaint*
¶330	On 7/12/01, *Bloomberg News* ran a story about Enron's Dabhol Power Plant stating: ENRON'S CEO SAYS WORST IS OVER IN INDIAN POWER UNIT DISPUTE Enron Corp. Chief Executive Jeffrey Skilling said he thinks the worst is over in the dispute between Enron's Dabhol Power Co. utility and its sole customer, an arm of the Indian state of Maharashtra. "***I think we're past the high-water mark***," Skilling said in an interview following the release of the company's second-quarter earnings. "***There will continue to be noise, but I think the contracts are very clear. They have very strong provisions, so they will be enforced.***" ***Enron has "zero intention of taking any economic loss on the project," he said. "Zero."***
¶331	On 7/12/01, Skilling appeared on CNNfn "Market Call," was interviewed and stated: CNNfn: ...SKILLING: Well, you know, it's a little bit of the "Tale of Two Cities." You know, the energy business is very strong. As you can see from our numbers, we had a great quarter-another great quarter in the energy business. Broadband business is suffering from some of the problems the broadband business has, ***but luckily, in Enron, it's a very small portion of our net income. So, the real story for Enron is this strong, strong growth and strong profitability of our energy business.***
¶332	On 7/12/01, Skilling appeared on CNNfn "The Money Gang," was interviewed and stated: ***The energy business is very strong. As you can see from our numbers, we had a great quarter, another great quarter, in the energy business.... So the real story for Enron is just strong, strong growth and strong profitability of our energy business.***
¶337	On 7/25/01, *Bloomberg News* reported on Enron's Analyst Conference in New York: ***ENRON'S SKILLING VOWS TO MEET OR BEAT PROFIT PROJECTIONS*** ***Analysts have also cited concern about unpaid power bills by Enron customers in California and India, and losses by Enron's broadband trading unit, which may hurt Enron's profits.*** "***All of these are bunk," Skilling said. "These are not issues for this stock.***"
¶343	On 8/14/01, Enron announced that its new CEO Skilling was resigning "***for personal reasons***" and would be succeeded by Lay. ... In a conference call with analysts, investors and large Enron shareholders...: • Skilling stated: "***First of all ... this is purely a personal decision and I can't stress enough that it has nothing whatsoever to do with Enron. I am doing it solely for personal and family reasons. [M]y reasons for leaving the business are personal and I'd just as soon keep those private.***" • Skilling stated: "***The numbers, the earnings show that the company is just in excellent shape right now. There is nothing to disclose, the company is in great shape and I just want to reinforce it.... The company is in great shape***.... [E]verybody that has looked at the numbers knows, this is an entirely personal decision ...." • Skilling stated: "***I think right now the numbers are looking good.*** ... So, I am feeling real good about that.... I think people ought to be focusing on is the whole European expansion. ***Very, very strong growth in Europe and that continues***. And that is a big, big market, so across the whole wholesale business, I think it's pretty much steady as she goes. ***We have got a lot going on and it looks like it is succeeding very, very well.***"...

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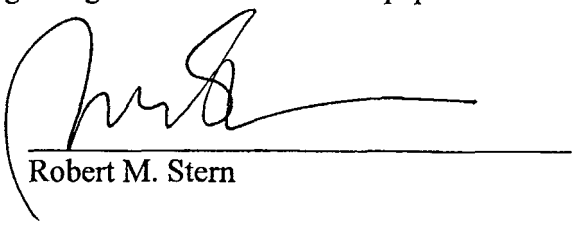
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2002 I caused a true and correct copy of the foregoing:

- Defendant Jeffrey K. Skilling's Motion to Dismiss Plaintiffs' Consolidated Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Memorandum of Law in Support Thereof;
- Exhibits in Support of Defendant Jeffrey K. Skilling's Memorandum of Law and Motion to Dismiss; and
- Defendant Jeffrey K. Skilling's Proposed Order Dismissing Plaintiffs' Consolidated Complaint

to be served on all counsel of record service electronically by e-mail, facsimile, or first-class mail pursuant to the Court's April 4, 2002 order regarding service and notice of papers.



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